

No. 92-2038-CFX  
Status: GRANTED

Title: Asgrow Seed Company, Petitioner  
v.  
Denny Winterboer and Becky Winterboer, dba DeeBees

Docketed:  
June 23, 1993

Court: United States Court of Appeals for  
the Federal Circuit

Counsel for petitioner: Stanley, Richard Loren

Counsel for respondent: Bode, William H.

Entry	Date	Note	Proceedings and Orders
-------	------	------	------------------------

1	Jun 23 1993	G	Petition for writ of certiorari filed.
3	Jul 22 1993	G	Motion of American Seed Trade Association for leave to file a brief as amicus curiae filed.
2	Jul 23 1993	G	Motion of Intellectual Property Owners for leave to file a brief as amicus curiae filed.
4	Jul 23 1993	G	Motion of American Intellectual Property Law Association for leave to file a brief as amicus curiae filed.
5	Jul 26 1993		Brief of respondents Denny Winterboer, et al. in opposition filed.
6	Jul 28 1993		DISTRIBUTED. September 27, 1993
7	Aug 4 1993	X	Reply brief of petitioner filed.
8	Oct 4 1993		Motion of American Seed Trade Association for leave to file a brief as amicus curiae GRANTED.
9	Oct 4 1993		Motion of Intellectual Property Owners for leave to file a brief as amicus curiae GRANTED.
10	Oct 4 1993		Motion of American Intellectual Property Law Association for leave to file a brief as amicus curiae GRANTED.
11	Oct 4 1993	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
14	Mar 18 1994		Brief amicus curiae of United States filed.
12	Mar 21 1994		LODGING consisting of a single document received from the Solicitor General.
13	Mar 23 1994		REDISTRIBUTED. April 15, 1994 (Page 1)
15	Apr 18 1994		Petition GRANTED.
17	May 25 1994		***** Order extending time to file brief of petitioner on the merits until June 10, 1994.
18	Jun 10 1994		Joint appendix filed.
19	Jun 10 1994		Brief of petitioner Asgrow Seed Company filed.
20	Jun 10 1994		Brief amicus curiae of American Seed Trade Association filed.
21	Jun 10 1994		Brief amicus curiae of James G. McDonald filed.
22	Jun 10 1994		Brief amicus curiae of American Intellectual Property Law filed.
23	Jun 10 1994		Brief amicus curiae of United States filed.
24	Jun 27 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Jul 1 1994		Order extending time to file brief of respondent on the merits until August 1, 1994.
27	Aug 1 1994		Brief of respondent Denny Winterbroer, et al. filed.
28	Aug 1 1994		Brief amici curiae of Rural Advancement Foundation

Entry	Date	Note	Proceedings and Orders
			International, et al. filed.
29	Aug 1 1994		Brief amicus curiae of Ted Cook filed.
30	Aug 2 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
31	Aug 5 1994		CIRCULATED.
32	Aug 10 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Federal Circuit.
33	Aug 12 1994		Record filed.
		*	Original record proceedings U.S. District Court, Northern District of Iowa (SEALED DOCUMENTS)
35	Aug 17 1994		SET FOR ARGUMENT MONDAY, NOVEMBER 7, 1994. (2ND CASE).
34	Aug 18 1994	D	Motion of respondents for additional time for oral argument filed.
36	Sep 2 1994	X	Reply brief of petitioner filed.
37	Sep 26 1994		Motion of respondents for additional time for oral argument DENIED.
38	Oct 18 1994	X	Supplemental brief of petitioner filed.
39	Oct 18 1994		LODGING consisting of 40 copies of PL 103-349, 108 Stat 3136 received from counsel for the petition.
40	Nov 7 1994		ARGUED.



92-2038

No. —

JUN 23 1993

OFFICE OF THE CLERK

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1992

---

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

---

Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

---

**PETITION FOR WRIT OF CERTIORARI**

---

*Of Counsel:*

BRUCE STEIN  
ROBERT A. ARMITAGE  
SIDNEY B. WILLIAMS, JR.  
THE UPJOHN COMPANY  
7000 Portage Road  
Kalamazoo, Michigan 49001  
(616) 323-4000  
LAWRENCE C. MAXWELL  
TRABUE, STURDIVANT &  
DEWITT  
511 Union Street  
Nashville, Tennessee 37219  
(615) 244-9270

RICHARD L. STANLEY  
*Counsel of Record*  
JOHN F. LYNCH  
ARNOLD, WHITE & DURKEE  
750 Bering Drive  
Suite 400  
Houston, Texas 77057  
(713) 787-1400  
*Counsel for Petitioner*  
*Asgrow Seed Company*

### QUESTIONS PRESENTED

The Plant Variety Protection Act, 7 U.S.C. §§ 2321-2581, provides legal protection for novel varieties of sexually reproduced plants. 7 U.S.C. § 2541 specifies the acts of infringement, including selling the novel variety. The District Court held that the exemption from infringement in 7 U.S.C. § 2543 allows a qualified person to save seed of a protected variety from a crop produced by that person and to sell no more than the amount of seed that would have been needed to produce another crop on that person's farm. The Court of Appeals for the Federal Circuit reversed.

The questions presented are:

(1) Whether the Federal Circuit erred as a matter of law in holding that 7 U.S.C. § 2543 permits up to half of a farmer's crop produced from a protected novel plant variety to be sold as seed in competition with the owner of the novel variety?

2) Whether the seed sales authorized by 7 U.S.C. § 2543 remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the purchaser that the seed being sold is a protected novel variety?

## PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the District Court and in the Court of Appeals are listed in the caption of the case. Pursuant to Supreme Court Rule 29.1, Asgrow states that it is a wholly-owned subsidiary of The Upjohn Company. Asgrow has no other publicly-owned parents, subsidiaries, or affiliates.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDING .....	ii
TABLE OF AUTHORITIES .....	v
PREVIOUS OPINIONS IN THE CASE .....	1
JURISDICTION .....	1
STATUTES INVOLVED .....	2
STATEMENT OF THE CASE .....	2
A. General Background .....	3
B. The Proceedings In The District Court .....	4
C. The Proceedings In The Court Of Appeals .....	7
D. Denial Of Asgrow's Suggestion For Rehearing In Banc .....	10
REASONS FOR GRANTING THE WRIT .....	11
I. THE COURT OF APPEALS' DECISION IS DIRECTLY CONTRARY TO THE STATU- TORY LANGUAGE, THE EXPRESS INTENT OF CONGRESS, AND THE STATED PUR- POSES FOR THE ACT .....	12
A. By Excepting Action That Might Infringe Under 7 U.S.C. § 2541 (3), Congress Limited The Amount Of A Novel Variety That Could Be Sold As Seed Under Section 2543 .....	13
1. The Federal Circuit Misconstrued The Introductory Clause Of Section 2548 And Its Incorporation Of Section 2541 (3) ....	14

## TABLE OF CONTENTS—Continued

	Page
2. The Only Portion Of A Crop Produced From Authorized Seed That Can Be Sold As Seed Under Section 2543 Is The Amount Needed To Produce Another Crop On The Farmer's Own Farm .....	16
B. After Limiting The Amount Of Saved Seed, Congress Allowed Sales Of "Such Saved Seed" To Take Place Between Farmers Without Violating Section 2541 (3) .....	18
C. The Legislative History Confirms That The Right To Sell "Such Saved Seed" Is Limited To The Amount Needed For Producing A Crop On The Farm .....	20
D. The Notice Requirements Of Section 2541 (6) Must Apply To Any Sales Made In Accordance With The Provisions Of 7 U.S.C. § 2543 .....	21
II. CERTIORARI IS NECESSARY TO CORRECT THE COURT OF APPEALS' CLEAR ERROR ON A MATTER OF NATIONAL IMPORTANCE .....	23
III. REVIEW MUST BE GRANTED NOW TO PRESERVE THE PVPA AS AN INCENTIVE FOR INNOVATION IN NOVEL VARIETIES AND TO PREVENT IRREPARABLE DAMAGE TO THE NATION'S AGRICULTURE AND ECONOMY .....	26
CONCLUSION .....	30

## TABLE OF AUTHORITIES

Cases	Page
<i>A.H. Phillips, Inc. v. Walling</i> , 324 U.S. 490 (1945) .....	12
<i>Cardinal Chem. Co. v. Morton Int'l, Inc.</i> , 61 U.S.L.W. 4461 (1993) .....	27
<i>Cornelius v. Nutt</i> , 472 U.S. 648 (1985) .....	26
<i>Delta and Pine Land Co. v. Peoples Gin Co.</i> , 694 F.2d 1012 (5th Cir. 1983), <i>aff'g</i> , 546 F. Supp. 939 (N.D. Miss. 1982) .....	27, 28
<i>Diamond v. Chakrabarty</i> , 447 U.S. 303 (1980) .....	2
<i>Eli Lilly &amp; Co. v. Medtronic, Inc.</i> , 496 U.S. 661 (1990) .....	27
<i>In re Trans Alaska Pipeline Rate Cases</i> , 436 U.S. 631 (1978) .....	20
<i>Landreth Timber Co. v. Landreth</i> , 471 U.S. 681 (1985) .....	14
<i>Oates v. First National Bank of Montgomery</i> , 100 U.S. (10 Otto) 239 (1879) .....	12
<i>Perrin v. United States</i> , 444 U.S. 37 (1979) .....	15
<i>Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.</i> , 497 F.2d 203 (9th Cir.), <i>cert. denied</i> , 419 U.S. 999 (1974) .....	15
<i>United States v. Fausto</i> , 484 U.S. 439 (1988) .....	27
<i>United States v. Lexington Mill &amp; Elevator Co.</i> , 232 U.S. 399 (1914) .....	19
<i>United States v. Morton</i> , 467 U.S. 822 (1984) .....	27
Statutes	
7 U.S.C. § 2321-2581 .....	2
7 U.S.C. § 2401 (a) .....	3
7 U.S.C. § 2541 .....	2, 11, 13, 15, 22
7 U.S.C. § 2541 (1) .....	<i>passim</i>
7 U.S.C. § 2541 (2) .....	8, 15, 22
7 U.S.C. § 2541 (3) .....	<i>passim</i>
7 U.S.C. § 2541 (4) .....	5, 15
7 U.S.C. § 2541 (5) .....	8, 15, 22
7 U.S.C. § 2541 (6) .....	<i>passim</i>
7 U.S.C. § 2541 (7) .....	8, 15, 22
7 U.S.C. § 2541 (8) .....	8, 15, 22
7 U.S.C. § 2543 .....	<i>passim</i>



## TABLE OF AUTHORITIES—Continued

	Page
7 U.S.C. § 2567 .....	23
7 U.S.C. § 2581 .....	11
28 U.S.C. § 1254 (1) .....	2
28 U.S.C. § 1292 (a) (1) .....	2
28 U.S.C. § 1292 (c) (1) .....	2, 7
28 U.S.C. § 1295 .....	27
28 U.S.C. § 1338 (a) .....	1
35 U.S.C. § 161-164 .....	2
 <i>Others</i>	
2A Singer, Sutherland Statutory Construction, § 46.06 (1992) .....	19
H.R. Rep. No. 13631, 91st Cong., 1st Sess. (1969) ..	21
H.R. Rep. No. 1605, 91st Cong., 2d Sess., <i>reprinted</i> <i>in</i> 1970 U.S.C.C.A.N. 5082 .....	21, 23
H.R. Rep. No. 312, 97th Cong., 1st Sess. (1981) ....	26
S. Rep. No. 91-1138, 91st Cong., 2d Sess. (1970) ....	21
Webster's New World Dictionary (3d col. ed. 1988) .....	16

## PETITION FOR WRIT OF CERTIORARI

Asgrow Seed Company ("Asgrow") respectfully petitions that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit in the above-captioned proceeding.

## PREVIOUS OPINIONS IN THE CASE

The opinion of the Court of Appeals issued on December 21, 1992, and is reported at 982 F.2d 486. That opinion has been reprinted in Appendix ("App.") A, pp. 1a-14a. The Court of Appeals reversed the judgment of the United States District Court for the Northern District of Iowa, a decision that was rendered upon cross-motions for summary judgment. The memorandum opinion of the District Court is reported at 795 F. Supp. 915, and is reprinted at App. B, pp. 15a-26a.

On March 25, 1993, the Court of Appeals simultaneously denied Asgrow's petition for rehearing and declined Asgrow's combined suggestion for rehearing in banc. App. C, pp. 27a-28a. However, five of the eleven active judges on the Court of Appeals would have reheard the case in banc. App. C, p. 28a. One of those five, Judge Newman, filed a separate opinion dissenting from the denial of rehearing in banc. Judge Rader, the author of the Court of Appeals panel opinion, filed an additional opinion concurring in the denial of rehearing in banc. The two opinions accompanying the denial of rehearing in banc are reported at 989 F.2d 478, and are reprinted in App. C, pp. 28a-38a.

## JURISDICTION

The Court of Appeals denied Asgrow's timely petition for rehearing in an order dated March 25, 1993. Acting on a motion by Asgrow, the mandate of the Court of Appeals was stayed by an order of that court entered on April 12, 1993, pending final disposition of the issues raised by the present petition. App. D, p. 39a. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1338(a). The jurisdiction of the Court of Ap-

peals was invoked pursuant to 28 U.S.C. § 1292(a)(1) and 28 U.S.C. § 1292(c)(1). This court has jurisdiction to entertain the present petition under 28 U.S.C. § 1254(1).

### STATUTES INVOLVED

The statutory provision at issue is the "Right To Save Seed" set forth in the first sentence of 7 U.S.C. § 2543, which provides:

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

The full text of 7 U.S.C. § 2543 has been reproduced at App. E, p. 41a. In light of the relationship between section 2543 and the infringement provisions in 7 U.S.C. § 2541, the full text of 7 U.S.C. § 2541 has been set forth at App. E, pp. 40a-41a.

### STATEMENT OF THE CASE

The Plant Variety Protection Act ("PVPA" or "Act"), 7 U.S.C. § 2321-2581, provides "patent-like" legal protection for sexually reproduced plants, including many economically important crops which comprise a basic and indispensable segment of American agriculture.<sup>1</sup> Since

<sup>1</sup> Asexually reproduced plants, such as those propagated by grafting or budding, have been legally protected since 1930 by Chapter 15 of the Patent Act, 35 U.S.C. §§161-164. See *Diamond v. Chakra-*

the PVPA was enacted in 1970, the private development of novel plant varieties such as cotton, wheat, and soybeans has had a profound effect on the productivity and global competitiveness of American agribusiness. The entire plant breeding industry and its many benefits to agriculture in the United States are now threatened by the Court of Appeals' ruling in this case, which allows farmers to sell large quantities of PVPA-protected seed in direct competition with the owner of the novel plant variety.

### A. General Background

A "variety" is a sexually-reproducing plant that is self-generating. See 7 U.S.C. § 2401(a) (defining "novel variety" under the PVPA). Because a variety will perpetuate itself, the seeds from one generation produce plants in the next generation that are nearly identical in characteristics to those in the former. For that reason, a farmer can grow the same novel variety plants, and obtain the same beneficial results, without needing to purchase any additional seed from the seed company. If a particular variety is disease-resistant and/or high-yielding, its seed will have great commercial value when used for reproductive (seed) purposes.

For varieties such as lettuce, celery, and cotton, the seed of the sexually-reproduced plant may be incidental to the value of the crop. For others, such as wheat and soybeans, the primary value of the crop is the seed. In the case of the soybean varieties at issue here, it takes approximately one bushel of soybeans used as seed to plant an acre, and each bushel planted can produce yields of approximately 45 bushels of the same soybeans. Thus, a farmer will easily be able to save enough PVPA-protected soybeans as seed to replace what he started with, and still have many more bushels of soybeans to use or sell for other purposes.

*barty*, 447 U.S. 303, 313 (1980). A more extensive discussion of the history leading to the enactment of the PVPA will be provided in the amicus curiae brief to be submitted by the American Seed Trade Association in support of this petition.



A farmer's soybean crop will be utilized either for reproductive (seed) purposes or for non-reproductive (grain or feed) purposes. A farmer will usually sell his soybean crop to a grain elevator or processor for about \$6 per bushel, where the soybeans will be processed for various end uses. At a cost of about \$1 per bushel, some farmers have a portion of their soybeans cleaned and stored for future use as seed. Because the cleaned soybeans are often stored in unmarked brown paper bags, such seed is commonly referred to as "brown bag" seed.

Soybeans command a higher price when sold for use as seed than when sold for grain or feed. A farmer will be able to sell "brown bag" seed at a much lower price than the registered owner because the farmer does not incur the owner's research, development, conditioning, production, and marketing costs.<sup>2</sup> Thus, a farmer will be motivated to sell as much as possible of his soybean crop to others for use as seed, subject only to the limits imposed by market conditions, by his own farm needs, or by law.

#### **B. The Proceedings In The District Court**

Asgrow is the assignee of the Certificates of Plant Variety Protection covering the two PVPA-protected soybean varieties at issue in this case, which are marketed by Asgrow under the designations A1937 and A2234. Dennis and Becky Winterboer ("the respondents") are farmers who grow primarily corn and soybeans on a farm of about 800 acres in Clay County, Iowa. A majority of all crops grown on respondents' farm are used or sold for nonreproductive purposes. However, nearly all of the respondents' crop of Asgrow's PVPA-protected soybeans is sold by them as "brown bag" seed.

In 1990, the respondents used PVPA-protected soybean seed purchased from Asgrow to produce a crop of 12,037

<sup>2</sup> In 1990, the respondents sold their brown bag seed at an average price of \$8.70 per bushel. In contrast, Asgrow's sales agents charged between \$16.20 and \$16.80 for each bushel of Asgrow seed.

bushels of Asgrow soybeans on 265 acres of their farm. The respondents then sold 10,529 bushels of that crop (over 85%) to others for use as seed, which was the maximum portion saleable as seed after broken or damaged soybeans had been removed. Each year since 1986, the respondents have sold their entire saleable Asgrow soybean crop to others for use as seed, and have purchased new seed directly from Asgrow to satisfy their own planting needs.

On January 24, 1991, Asgrow filed suit against the respondents in the United States District Court for the Northern District of Iowa, alleging infringement under 7 U.S.C. § 2541(1) for selling or offering to sell Asgrow's PVPA-protected novel soybean varieties, under 7 U.S.C. § 2541(3) for sexually multiplying Asgrow's novel varieties as a step in marketing those varieties for growing purposes, and under 7 U.S.C. § 2541(6) for dispensing Asgrow's novel varieties to another in a form which could be propagated without providing notice that the seeds were of a protected variety. The respondents defended by asserting that their activities were within the statutory exemption from infringement provided by 7 U.S.C. § 2543.

On cross-motions for summary judgment, the respondents contended that 7 U.S.C. § 2543 permitted unlimited quantities of a PVPA-protected novel variety grown from "authorized seed"<sup>3</sup> to be sold as seed without any liability for infringement as long as both the seller and the purchaser were persons whose "primary farming occupation is the growing of crops for sale for other than repro-

<sup>3</sup> The term "authorized seed" is used by petitioner to signify any "seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes." See 7 U.S.C. § 2543. While usage of that term is in complete accord with the express terms of section 2543, it is inconsistent with the Court of Appeals' opinion, which failed to give any significance to the "descended from seed obtained" language in the statute. See App. A, p. 6a ("a farmer who purchases PVPA seed from another farmer cannot save any seed from the crop grown with brown bag seed [because p]urchasers of brown bag seed do not obtain the protected seed 'by authority of the [PVPA certificate] owner.'").

ductive purposes." App. B, p. 18a. The respondents claimed that they were free from infringement liability under the exemption in section 2543 on grounds that over half of all crops produced on their farm were sold for nonreproductive purposes, even though virtually all of their soybean crop produced from Asgrow's PVPA-protected seed was sold for reproductive purposes.

Asgrow maintained before the District Court that the respondents' interpretation could not have been intended by Congress as it would swallow up the protection provided by the PVPA and would defeat the purposes of the PVPA. Asgrow's position was that the only interpretation of section 2543 that was consistent with the purpose and wording of the Act is that a farmer could only be entitled to save as much seed as he could reasonably use to produce a crop on his farm during the next year. Then, if for some reason the farmer did not or could not plant his saved seed during the next growing season, he could sell such saved seed to another farmer without liability to Asgrow so that the farmer's saved seed would not be wasted.

On September 30, 1991, the District Court granted Asgrow's motion and denied the respondents' motion. See App. B. The District Court held that "[s]aved seed shall be limited to the amount of PVPA-protected seed reasonably needed by the farmer who grew it to plant the number of acres of the protected variety, or its progeny, he or she needs in the upcoming crop year." App. B, p. 24a. The District Court also concluded that a farmer selling seed in accordance with 7 U.S.C. § 2543 was required to give notice that the seed sold was a protected variety, as required by 7 U.S.C. § 2541(6). App. B, p. 17a n.2. Holding that the respondents were in violation of 7 U.S.C. § 2541(1) and (3), the District Court enjoined them from "selling any seed, except for saved seed, to other farmers, and/or engaging in any form of brown bagging." App. B, p. 24a.<sup>4</sup>

<sup>4</sup> On November 14, 1991, the District Court modified a footnote in its prior opinion to clarify that the issue of whether respondents

### C. The Proceedings In The Court Of Appeals

The respondents filed an appeal of the District Court's injunction to the United States Court of Appeals for the Federal Circuit. See 28 U.S.C. § 1292(c)(1). Twelve amicus curiae briefs were submitted to the Court of Appeals supporting Asgrow and an affirmance of the result reached by the District Court.<sup>5</sup> However, neither Asgrow nor the majority of the supporting amici directly endorsed the specific statutory analysis employed by the District Court to explain its result.

On December 21, 1992, the Court of Appeals reversed. The Court of Appeals held that 7 U.S.C. § 2543 did not contain any language that quantitatively limits a farmer's sale of PVPA seed to the amount of seed necessary to grow another crop. See App. A. Instead, the Court of Appeals held that section 2543 permitted up to half of every crop produced by any person from seed obtained by authority of the PVPA certificate owner to be sold as seed in competition with the certificate owner, as long as at least fifty percent of the selling person's crop in that specific PVPA-protected variety is sold for nonreproductive purposes.<sup>6</sup> App. A, pp. 7a-9a.

had complied with Iowa labelling law, as required by 7 U.S.C. § 2543, had not been reached. App. B, pp. 25a-26a.

<sup>5</sup> The twelve amicus curiae briefs were submitted to the Court of Appeals by (1) Agrigenetics Company; (2) Agripro Bioscience Inc.; (3) the American Seed Trade Association; (4) Dekalb Plant Genetics; (5) Delta and Pine Land Company; (6) Dole Fresh Vegetables, Inc. and Bud Antle, Inc.; (7) Golden Harvest Seeds, Inc.; (8) Jacob Hartz Seed Company, Inc.; (9) Northrup King Co.; (10) Pioneer Hi-Bred International, Inc.; (11) Stoneville Pedigreed Seed Company; and (12) Tanimura & Antle, Inc. The Tanimura & Antle brief also sought to clarify language in the District Court's opinion implying that section 2543 limited the amount of seed that could be saved by a farmer for his own use, rather than merely limiting the amount of saved seed that could be sold.

<sup>6</sup> That striking alteration of the scope of PVPA-seed sales authorized by section 2543 aptly underscores the reason for the present petition. To illustrate, assume a farmer with a 1000-acre farm purchases 1000 bushels of PVPA-protected soybean seed from Asgrow and produces 45,000 bushels of Asgrow soybeans. Under



The Court of Appeals interpreted the introductory clause to the first sentence of section 2543 to mean that a farmer within the "crop exemption"<sup>7</sup> remains subject to infringement under subsections (3) and (4) of 7 U.S.C. § 2541 but is exempted from liability for any acts prohibited by subsections (1), (2), (5), (6), (7), and (8). App. A, pp. 6a, 13a. Based on that interpretation, the Court of Appeals disagreed with the District Court's conclusion that any sales of PVPA-protected seed permitted under section 2543 were still subject to the notice requirement in 7 U.S.C. § 2541(6). App. A, p. 13a.

The only quantitative limitation on PVPA-seed sales that the Court of Appeals was able to discern from the statutory language of the exemption was that the seller and buyer of brown bag seed had to be persons whose "primary farming occupation is the growing of crops for sale for other than reproductive purposes." 7 U.S.C. § 2543. The Court of Appeals also held that, because "[t]he PVPA separately protects each novel seed variety," the "primary farming occupation" determination must be made on "a crop-by-crop basis" with respect to each specific novel variety protected under the Act.<sup>8</sup> App. A, p. 8a.

the Court of Appeal's interpretation of section 2543, that farmer could then sell up to 22,500 bushels of his crop to other farmers for use as seed. In stark contrast, Asgrow contends that the exemption in section 2543 expressly limits that same farmer to selling no more than the 1000 bushels of seed needed to produce another crop on his farm, as concluded by the District Court.

<sup>7</sup> The Court of Appeals erroneously labelled the entirety of 7 U.S.C. § 2543 as "the crop exemption" and used that designation throughout its opinion. However, the title of section 2543, as well as the legislative history of the Act, demonstrates that the "crop exemption" is set forth wholly in the second sentence of 7 U.S.C. § 2543, while it is the "Right To Save Seed" set forth in the first sentence of section 2543 that is the only part of the statute at issue in this case. See *infra* section I.C.

<sup>8</sup> Due to its "crop-by-crop" methodology as to how the "primary farming occupation" determination was to be made, the Court of Appeals' analysis and ruling differed significantly from the respondents' position before the District Court and before the Court of Appeals.

Unable to find any suggestion in the legislative record to cast doubt on its own interpretation (App. A, pp. 9a-10a), the Court of Appeals explained that an incorrect ellipsis in the District Court's opinion resulted in "the omission of important language necessary for a correct interpretation." App. A, p. 11a. In rejecting the District Court's result along with its explanation, the Court of Appeals declared that "this court recognizes that, without meaningful limitations, the crop exemption could undercut much of the PVPA's incentives" but held that "[t]he Act, as written, however, contains no ensuing crop limitation as determined by the District Court." App. A, p. 12a.

Noting that section 2541(3) did not permit farmers to "market" protected novel varieties, the Court of Appeals cautioned that "an expansive reading of the term 'marketing' would swallow the entire crop exemption." App. A, p. 12a. To alleviate that concern, the Court of Appeals decided that "[m]arketing" in the context of the PVPA is limited to extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." App. A, pp. 12a-13a. As a result, the Court of Appeals held that "[t]his form of marketing of sexually multiplied novel varieties violates exclusive rights under the Act, without regard to the crop exemption." App. A, p. 13a.

Judge Lourie, a member of the Court of Appeals panel, issued a concurring opinion that agreed solely with the panel's result and with "the panel's discussion of the limitation on saved seed which was the basis for the district court's decision." App. A, p. 14a. However, Judge Lourie stated that "I cannot join the remainder of the [panel's] opinion because it attempts to characterize and interpret other parts of this complex statute that I believe are not before us and have not been briefed."<sup>9</sup> App. A, p. 14a.

<sup>9</sup> When ruling how a person's "primary farming occupation" was to be determined, the Court of Appeals did not have the benefit of

#### D. Denial Of Asgrow's Suggestion For Rehearing In Banc

The Jacob Hartz Seed Company, Inc. ("Hartz") submitted an amicus curiae brief to the Court of Appeals that supported the same conclusion reached by Asgrow and the District Court, *i.e.*, that a farmer could sell no more of his crop of a protected novel variety as seed under section 2543 than he would have needed to plant on his farm in the following year. Although the Hartz analysis of the statutory language of section 2543 differed somewhat from the other interpretations advanced before the District Court and the Court of Appeals, the Court of Appeals did not specifically address or even acknowledge the Hartz analysis.

In its combined petition for rehearing and suggestion for rehearing in banc, Asgrow reiterated the analysis of section 2543 that had been submitted to the Court of Appeals by Hartz, which had previously been only before the three-judge panel.<sup>10</sup> Asgrow's suggestion for in banc review was declined by a single vote, 6-5, with the two active judges on the panel among the six judges that did not vote to have the full Court of Appeals revisit the panel's decision. App. C, p. 28a.

Judge Newman issued an extensive opinion dissenting from the denial of Asgrow's suggestion for rehearing by the full Court of Appeals, stating that the panel "has reached an interpretation of [the first sentence of 7 U.S.C. § 2543] that is contrary to the statute and its purpose." App. C, p. 30a. Judge Newman further stated:

---

any briefing. For purposes of the cross-motions for summary judgment, the parties had agreed that respondents' "primary farming occupation" was the growing of crops for nonreproductive purposes. Moreover, the basis for such a comparison (*e.g.*, acres planted, crop size, income received, etc.) was also not at issue between the parties. Finally, neither party even suggested that the term "marketing" had anything other than its ordinary meaning.

<sup>10</sup> The statutory analysis in the Hartz amicus curiae brief and in Asgrow's suggestion for rehearing in banc also constitutes the legal position set forth in this petition.

The Act was not designed to permit farmers to grow and sell seed of certified varieties as a business, to enter the commercial seed business in competition with the creator of the new variety. The panel majority, by allowing up to half of a farmer's crop to be sold as seed, authorizes this practice, in a travesty of statutory interpretation.

App. C, p. 32a (footnote omitted). Judge Newman also observed that "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." App. C, p. 30a.

Judge Rader, the author of the Court of Appeals opinion, took the unusual step of responding to Judge Newman's dissent. Four days later, he issued a separate opinion concurring in the denial of Asgrow's suggestion for rehearing. App. C, pp. 28a-30a.

#### REASONS FOR GRANTING THE WRIT

The legal protection provided by Congress in the PVPA to owners of novel plant varieties is critical to the private seed breeding industry's continued and future research activities in developing new and improved varietal seeds and bringing them to the market. That vital and needed protection has now been effectively repealed by the Court of Appeals' faulty interpretation of 7 U.S.C. § 2543. Unless the statutory language of the first sentence of section 2543 is restored to its intended interpretation by this Court, the renewed development and continued competitiveness of American agriculture in plant varieties will be crippled by a poorly-reasoned ruling that is contrary to the language of section 2543, its legislative history, and Congress's express intent and purpose for the Act.

The Act expressly provides that "[i]t is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end." 7 U.S.C. § 2581 (emphasis added). Yet the Court of Appeals' construction of section 2543 subverts that congressional intent by creating an immense loophole to section 2541 that eviscerates the incentives



and protections that Congress intended the Act to provide.<sup>11</sup>

This petition will establish that the Court of Appeals' interpretation of the first sentence of 7 U.S.C. § 2543 is wrong as a matter of law. More importantly, this petition will demonstrate that the ramifications of leaving the Federal Circuit's opinion as the controlling precedent as to the meaning of section 2543 will be devastating for the nation's agriculture, its farmers, and the PVPA itself.

**I. THE COURT OF APPEALS' DECISION IS DIRECTLY CONTRARY TO THE STATUTORY LANGUAGE, THE EXPRESS INTENT OF CONGRESS, AND THE STATED PURPOSES FOR THE ACT**

Statutes should be construed to avoid attributing absurd results to Congress. *E.g., Oates v. First National Bank of Montgomery*, 100 U.S. (10 Otto) 239, 244 (1879). However, this is not a case in which the Court is being asked to interpret a statute in a manner contrary to its literal wording so that the statutory purpose or legislative intent can be preserved in spite of conflicting statutory language. In this case, the express wording of the statute, the explicit congressional intent set forth in the Act itself, and the stated purposes and policies for the Act are entirely consistent. Instead, it is the interpretation by the Court of Appeals that creates the absurd consequences that are wholly inconsistent with the express language, history, and purpose of the Act.

As aptly stated by Judge Newman, the Court of Appeals' construction of the first sentence of 7 U.S.C. § 2543 as allowing up to half of every crop produced

<sup>11</sup> See, e.g., *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (any exemption from legislation must be narrowly construed, giving due regard to the plain meaning of the statutory language and the intent of Congress). By construing the exemption from infringement in section 2543 so that respondents are able to sell over twenty-two times more soybean seed than they planted, the Federal Circuit has truly formulated an exception that swallows the rule.

from PVPA-protected seed to be sold as seed is truly "a travesty of statutory interpretation." App. C, p. 32a. If that interpretation is accepted, relatively few persons selling "brown bag" seed will be able to supply the entire market for a certificate owner's protected seed.<sup>12</sup> That is certainly not what Congress intended when it passed the PVPA to encourage private enterprise to invest in the research and development needed to produce new and better varieties. More importantly, that is not what Congress did.

**A. By Excepting Action That Might Infringe Under 7 U.S.C. § 2541(3), Congress Limited The Amount Of A Novel Variety That Could Be Sold As Seed Under Section 2543**

Without more, the mere act of saving the crop of a novel variety produced from "authorized seed" is not an infringement under any subsection of 7 U.S.C. § 2541. A farmer may plant, grow, and harvest as much of a protected novel variety as he is able, as long as he only saves it, uses it himself, or sells it to another for non-reproductive purposes. Infringement issues usually arise only when a farmer competes with the PVPA certificate owner by selling PVPA-seed produced on his farm.

Allowing farmers to sell their crops of PVPA-protected varieties as seed, at prices well below what the owner of the novel variety must charge to recover its development costs, will eventually strangle the private plant breeding industry that the PVPA was enacted to stimulate. Recognizing that, Congress provided a quantitative limitation in section 2543 on the amount of a PVPA-protected novel variety produced by a farmer that could be sold for reproductive purposes to other farmers.

The Federal Circuit construed section 2543 so that the "primary farming occupation" phrase is the only

<sup>12</sup> In 1990, Asgrow sold enough of its soybean seed in Iowa to plant 500,000 acres. Thus, only fifty farmers selling as much Asgrow seed as the respondents would eliminate Asgrow from the Iowa market in its own protected varieties.

quantitative restriction on the amount of a novel variety that may be sold as seed. However, that is not the quantitative limitation created or intended by Congress.<sup>13</sup> As shown below, the first sentence of section 2543, as enacted by Congress, expressly contains the specific quantitative limitation on a farmer's right to sell PVPA seed that was identified by Asgrow and the District Court—that amount of seed needed by the farmer to produce another crop on his farm.

**1. *The Federal Circuit Misconstrued The Introductory Clause Of Section 2543 And Its Incorporation Of Section 2541(3)***

"It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 683 (1985). 7 U.S.C. § 2543 starts with the following language:

*Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him . . . and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section . . . . (Emphasis added.)*

App. E, p. 41a.<sup>14</sup> The Court of Appeals concluded that the introductory clause meant that a farmer falling within the exemption set forth in section 2543 remains subject to infringement under subsections (3) and (4) of 7

<sup>13</sup> See App. C, p. 36a (Newman, J., dissenting) ("[t]he panel has misinterpreted this text, for this provision is directed to whether a farmer may sell *any* saved seed, not how much seed the farmer may sell (emphasis in original)).

<sup>14</sup> Subsection 2541(3) provides that it is an act of infringement to "sexually multiply the novel variety as a step in marketing (for growing purposes) the variety." App. E, p. 40a. As no infringement under 7 U.S.C. § 2541(4) was alleged in this case, the introductory clause of section 2543 will be discussed herein only in terms of its incorporation of the provisions of section 2541(3).

U.S.C. § 2541, but not under subsections (1), (2), (5), (6), (7), and (8). App. A, p. 6a. That construction distorts the words and phrasing used by Congress in section 2543 and skews the relationship between section 2543 and the provisions in section 2541.

Contrary to the Federal Circuit's cursory analysis, the introductory clause of section 2543 only means that the rest of its first sentence does not apply if the action in question constitutes sexually multiplying a PVPA-protected novel variety as a step in marketing the variety for growing purposes. There can be no question that the respondents "sexually multiplied" a protected novel variety because it is not disputed that they produced 45 bushels of soybeans from each bushel of Asgrow seed. It is also undisputed that the respondents sold nearly all such soybeans produced for use as seed (*i.e.*, for growing purposes) without authorization from or compensation to Asgrow. Thus, the sole remaining question is the extent to which that action by respondents constituted "a step in marketing" the Asgrow soybean varieties for growing purposes.

Absent an express definition in the statute, the term "marketing" in section 2541(3) should be given its ordinary, common meaning. *E.g.*, *Perrin v. United States*, 444 U.S. 37, 42 (1979). Without support, however, the Federal Circuit announced that "'marketing' in the context of the PVPA is limited to extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." App. A, pp. 12a-13a. However, it is "selling" that is an element of "marketing," not *vice versa*. *Cf. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 215 (9th Cir.) ("We think the term *marketing* is far broader than the word *sell*."), *cert. denied*, 419 U.S. 999 (1974).

For purposes of section 2541(3), "marketing" can only be interpreted to include *all* acts that lead up to and include selling PVPA-seed for reproductive purposes, in-



cluding direct farmer-to-farmer sales of saved seed.<sup>15</sup> In all cases where PVPA-seed has been sold by a person who produced that seed, the "sexual multiplication" of the novel variety which led to that person having any seed to sell is clearly "a step" in the marketing of the novel variety for growing purposes. Without that step, there would be no seed for the farmer to sell.

**2. The Only Portion Of A Crop Produced From Authorized Seed That Can Be Sold As Seed Under Section 2543 Is The Amount Needed To Produce Another Crop On The Farmer's Own Farm**

Congress provided a specific quantitative limitation on the amount of PVPA seed that can be sold under section 2543 by expressly excepting action that might constitute an infringement under section 2541(3). That limitation is the portion of a farmer's crop that was sexually multiplied *not* as a step in marketing the novel variety, but only for future use as seed on the farmer's own farm. It is only that amount of saved seed that can be permissibly sold to others for use as seed under the remainder of the first sentence in section 2543, and it is that amount which is the maximum part of a farmer's crop that can be the "such saved seed" to which the rest of that first sentence applies.

To illustrate, assume that a farmer with a 1,000-acre farm plants Asgrow's PVPA-protected soybean seed on his farm and produces a crop of 45,000 bushels (45 bushels per acre). The most that the farmer would need to save to use in the production of another crop on his

<sup>15</sup> Webster's New World Dictionary, 828 (3d col. ed. 1988), defines "marketing" as (1) "the act of buying and selling in a market" and (2) "all business activity involved in the moving of goods from the producer to the consumer, including selling, advertising, packaging, etc." The Federal Circuit relied on the same dictionary to obtain the "customary meaning" of the term "primary" as used in section 2543. App. A, p. 8a. There is no indication that Congress used ordinary definitions for some common words in section 2543 but not for others. See App. C, p. 35a.

farm would be 1,000 bushels (1 bushel of seed per acre). If the farmer saves more than 1,000 bushels to use as seed, he must be presumed to have done so in order to sell it because that excess seed will not be needed to produce a crop on his farm. Thus, any of the remaining 44,000 bushels from his crop that are sold for use as seed are outside the scope of the exemption in the first sentence of section 2543 because such seed will necessarily have been sexually multiplied as a step in marketing the novel variety for growing purposes.

The 1000 bushels of seed is the maximum amount that the hypothetical farmer could possibly have produced *without* having undertaken sexual multiplication as a step in marketing the protected variety for growing purposes. Those 1000 bushels of soybean seed saved to plant the farmer's own farm constitute the "such saved seed" referenced in section 2543. Thus, the Court of Appeals plainly erred when it concluded that "section 2543 does not contain any explicit limit that a farmer can save and sell only as much seed as necessary to plant an ensuing crop." App. A, p. 11a.

It is the initial exception from section 2541(3) that provides the quantitative limit on the amount of a protected novel variety that a farmer can later sell for use as seed under the terms of the statute, *i.e.*, the amount of seed necessary to produce a crop in that variety on the farmer's own farm.<sup>16</sup> Such a quantitative limitation does not create an undue hardship on the farmer who has already opted to benefit from the increased yield and disease-resistance advantages of the novel variety. More-

<sup>16</sup> Contrary to the Federal Circuit's opinion (App. A, p. 11a), the District Court did not hold that one bushel of seed per acre was the applicable limit under section 2543 for all varieties. Unlike the Federal Circuit, Congress and the District Court recognized that the amount of seed needed to be planted per acre will differ for each novel variety at issue. See App. B, pp. 21a-22a & n.3. For that reason, section 2543 was written by Congress with functional terms that remain applicable and quantifiable in each specific set of circumstances.

over, if a farmer knows he is limited by law to selling only as much seed as would be needed to produce a crop on his own farm, he will not save any more seed than he actually needs. Congress never intended the Act or section 2543 to convert farmers into commercial seed dealers.<sup>17</sup>

**B. After Limiting The Amount Of Saved Seed, Congress Allowed Sales Of "Such Saved Seed" To Take Place Between Farmers Without Violating Section 2541(3)**

Congress did not prohibit *all* sales of PVPA-seed by persons other than the owner. To the extent that "such saved seed" is not actually used to produce a crop on the farmer's farm, that limited amount of saved seed is available to be sold as provided.<sup>18</sup> The applicable provision is as follows:

*Provided, That without regard to the provisions of section (3) of section 2541 of this title, it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.*

App. E, p. 41a (emphasis added). After misconstruing the "first" reference to section 2541(3) in the introductory clause of section 2543, the Federal Circuit then failed to attribute any independent meaning to the "second" reference to section 2541(3) in the above provision.

"It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded every

<sup>17</sup> See App. C, p. 32a (Newman, J., dissenting) ("The Act was not designed to permit farmers to grow and sell seed of certified varieties as a business, to enter the commercial seed business in competition with the creator of the new variety.").

<sup>18</sup> In the previous example, the farmer could plant the 1,000 bushels of saved seed on his farm, or sell some or all of "such saved seed" to other farmers. However, no more than a total of 1000 bushels of saved seed could be planted *and* sold by that farmer.

word . . . [and] 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word, shall be superfluous, void, or insignificant.'" *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914) (citation omitted); *see also* 2A Singer, *Sutherland Statutory Construction*, § 46.06 (1992). The Court of Appeals assumed that the two references to section 2541(3) were redundant, as its sole mention of them was the following: "[i]n two explicit references, the Act clarifies that the crop exemption does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541." App. A, p. 12a. However, not only are the two references to section 2541(3) not redundant, but Congress included both for a specific purpose.

In the absence of the second reference to section 2541(3), a farmer would have no ability to sell any of the seed saved for use on his own farm because, as soon as the farmer decided to sell some of his "saved seed" to another, that seed would then have been sexually multiplied as a step in marketing it for growing purposes. By providing that the provisions of section 2541(3) are to be disregarded with respect to "such saved seed" sold in compliance with state law by a farmer to other farmers, Congress permitted a farmer to sell "such saved seed" (but no more) without being liable for having sexually multiplied that portion of his harvest as a step in marketing the novel variety for growing purposes (regardless of how "marketing" is defined).

The two distinct references to section 2541(3) in section 2543 were both necessary to accomplish Congress' stated purpose for the PVPA. Through its first reference to section 2541(3), Congress withheld nearly all of a farmer's harvest from the scope of the exemption set forth in the first sentence of section 2543; *i.e.*, that portion of the harvest in excess of that which was needed as seed in the production of a subsequent crop on that farmer's own farm. By so limiting the scope of the exemp-



tion, Congress afforded seed companies the opportunity to recoup the sizeable investments which resulted in the novel variety in the first place. Then, by adding the second reference to section 2541(3), Congress removed it as an obstacle to the farmer's sale of "such saved seed" as allowed by section 2543. In that manner, Congress allowed the farmers to avoid wasting any of their harvest without threatening the commercial viability of the private seed breeding industry it sought to stimulate.

Far from creating an absurd result, Asgrow's interpretation gives effect to both references to section 2541(3) and is true to the purposes that the PVPA was designed to foster. *See In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643-45 (1978). The same cannot be said of the interpretation made by the Court of Appeals or the one offered by the respondents.

**C. The Legislative History Confirms That The Right To Sell "Such Saved Seed" Is Limited To The Amount Needed For Producing A Crop On The Farm**

Asgrow's interpretation is entirely consistent with the applicable legislative history, which shows that section 2543 is a combination of two proposed provisions originally considered by Congress in the following form:

**Sec. 112. Right to Save Seed.**

Except under subsections (3) and (4) of section 111, it shall not infringe any right hereunder for a person to save seed and grow the resulting variety for his own use.

**Sec. 114 Crop Exemption.**

It shall not be an infringement to sell seed grown from the protected variety, obtained (for growing) by authority of the proprietor or by saving seed under section 112, for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose, and is in channels which are usual for that purpose and in a manner exclusively for that purpose.

H.R. Rep. No. 13631, 91st Cong., 1st Sess. 102-03 (1969). At that time, the proposed legislation contained no right to sell a protected variety for use as seed.

Sections 112 and 114 (and their titles) were later combined into a single section (Sec. 113) that is now 7 U.S.C. § 2543. Both houses of Congress summarized the newly-created ability of a qualified farmer to sell "such saved seed" for reproductive purposes as follows:

**Section 113. Right to Save Seed. Crop Exemption.**

This section authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; *to save seed from such crop for future use or planting on the farm*; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, *to sell such saved seed for reproductive purposes* to other persons so engaged.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11, *reprinted in* 1970 U.S.C.C.A.N. 5082, 5093; S. Rep. No. 91-1138, 91st Cong., 2d Sess. 12 (1970) (emphases added). From those summaries, it should have been clear that the right to sell a protected novel variety was restricted only to the seed saved from the farmer's crop "for future use or planting on the farm."

Despite quoting the same provision in the legislative record, the Federal Circuit somehow reached the opposite view of its plain language, holding that "[a]t no point did the legislative context for the text of the 1970 Act suggest that the crop exemption contains an ensuing crop limitation." App. A, p. 10a. On the contrary, the "suggestion" sought by the Federal Circuit is quite explicit.

**D. The Notice Requirements Of Section 2541(6) Must Apply To Any Sales Made In Accordance With The Provisions Of 7 U.S.C. § 2543**

Except as otherwise provided, it is an act of infringement under 7 U.S.C. § 2541(1) to sell a novel variety. Because Congress did provide otherwise in section 2543

with respect to sales under certain conditions, there is no infringement under section 2541(1) to the extent that sales of a novel variety are made in accordance with the provisions of section 2543. There is also no infringement under section 2541(3) to the extent that the sales in question were limited to "such saved seed" as provided by section 2543. However, those exemptions from the acts of infringement set forth in subsections (1) and (3) of section 2541 are the sole extent of the exemptions provided by section 2543.

Congress did not grant a blanket exemption to section 2541 when it allowed a farmer to sell "such saved seed" in section 2543; it only exempted specified action. The only "action" described in the statute is (1) saving seed produced, (2) using such saved seed in the production of a crop, and (3) using such saved seed for sale as provided. Of those acts, only "selling" is an act of infringement. For that reason, section 2543 must be viewed as providing a limited exemption from infringement only with respect to those portions of section 2541 that prohibit the specific "action" later exempted: certain sales of a protected variety that would otherwise be infringements under subsections (1) and (3) of section 2541.

The Federal Circuit erred by holding that the absence of section 2541(6) from the introductory clause of section 2543 meant that any seed sales authorized by section 2543 were also exempted from the notice requirements in section 2541(6). App. A, pp. 6a, 13a. Section 2541(6) remains applicable to all transactions in which the novel variety has been dispensed to another in a form which can be propagated, including sales of "such saved seed" under section 2543.<sup>19</sup> The policies supporting giving notice to all recipients of a PVPA-protected seed remain

<sup>19</sup> In addition to subsection (6), the non-sale portions of subsection (1) and subsections (2), (5), (7), and (8) of section 2541 also remain applicable to sales authorized under section 2543. As one obvious example, a farmer making the limited seed sales permitted under section 2543 is still not able to import or export the novel variety in violation of section 2541(2).

constant, regardless of the type of transaction involved. Moreover, requiring notice on all seed sales, whether "brown bag" seed or not, is consistent with Congress' intent in 7 U.S.C. § 2567 that a purchaser or user of the protected seed have actual notice of prohibited acts before being subject to damages for infringement.

The interpretation of section 2543 reached by the Court of Appeals allows up to half of a person's crop in a protected variety to be sold as seed and then exempts this immense quantity of seed sales from the notice requirements of section 2541(6). That illogical combination of arbitrary results was never intended by Congress, defies the purposes of the PVPA, and is contrary to the explicit language of the Act.

## II. CERTIORARI IS NECESSARY TO CORRECT THE COURT OF APPEALS' CLEAR ERROR ON A MATTER OF NATIONAL IMPORTANCE

When the PVPA was enacted in 1970, the House Committee on Agriculture listed the benefits that were expected to accrue in the United States as a direct result of providing legal protection for plant varieties.

1. It will greatly stimulate plant breeding.
2. It will allow our Government agricultural experiment stations to increase their efforts on needed basic research.
3. It would permit public expenditures for applied plant breeding to be deviated to important areas which industry may not pursue.
4. It will give farmers and gardeners more choice, and varieties which are better in yield or in quality, and so forth.
5. It will make American agricultural products more competitive in world markets.
6. Consumers and other purchasers of crops will benefit; in some instances by improved quality, in others by aiding the production needed to serve them.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 2-3, *reprinted* in 1970 U.S.C.C.A.N. 5082, 5083. If left unaddressed by



this Court, the Federal Circuit's erroneous interpretation of section 2543 will ensure that each of the benefits and policies supporting enactment of the PVPA will be frustrated.

As recognized by Judge Newman, "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." App. C, p. 30a. Even before the Federal Circuit's ruling, major seed companies such as Pioneer Hi-Bred International, Inc., Agripro Biosciences Inc., and Northrup King Co. were among those that had abandoned existing and reduced future variety research programs due to unfair price competition from illegal "brown bag" seed sales of their own PVPA-seed.<sup>20</sup> Now, the Federal Circuit's flawed legal analysis will only cause a bad situation to become much worse.

The significant costs of plant breeding research must ultimately be justified through recouping that investment from sustained sales of the new varietal seeds which reach the market. The plant breeding industry cannot justify its research and development expenditures unless the results of its efforts will be adequately protected from infringement. If the Federal Circuit's interpretation of section 2543 is accurate, seed companies have wasted an enormous amount of time and money over the past twenty years in developing novel plant varieties that they never had any legitimate chance of being able to protect. Having enacted the PVPA to encourage private industry to dedicate the necessary resources to breed new and improved plants, Congress clearly did not intend such a result.

Moreover, it will not be the seed companies that will be harmed the most by the Court of Appeals' evisceration of the PVPA. The seed companies will be able to redirect

<sup>20</sup> For a more detailed summary of the scope and effects of brown bag seed sales on the seed industry's past and future research efforts, see the amicus curiae brief to be submitted by the American Seed Trade Association.

their research funds to hybrids and to asexually-reproduced plants protected by the Plant Patent Act. The seed companies will also be able to transfer their research and development efforts for new varieties to foreign countries which have greater and more enforceable legal protection for sexually-reproduced plants. As research in novel varieties is shifted to other countries, American farmers will be unable to compete effectively in the international agricultural market as foreign yields increase as a result of new and improved varieties not available in this country.

Without effective PVPA protection, American farmers will suffer the continuing loss of the benefit from a steady stream of novel, improved varieties of plants which private research breeding contributes to the advancement of the science. Agriculture in the United States will return to the pre-Act era in which plant breeding was done primarily through public universities, whose shortcomings led to the enactment of the PVPA in the first place. Only now, such public sector research will not be able to keep the United States at the forefront of the world agricultural market because funding for plant breeding research has been reallocated or has simply disappeared through budget cuts.

As more private seed companies abandon their research and breeding programs, the agricultural performance in the varieties will inevitably decline. As the number of new varieties decreases, the needed presence and diversity of desirable plant traits in the improved varieties will be lessened and lost. While existing varieties cease to improve and develop, diseases and insects will continue to evolve, thus further reducing yields and performance. American consumers will be faced with poorer selection and higher prices for crops and products of the affected plant varieties. Thus, the legal questions presented by this case have enormous long-term significance far beyond their short-term effect on the private research seed companies doing most of the current plant breeding in this country.

The nation's economy, trade balance, and tax base will all be adversely affected as agricultural imports increase, farm production decreases, and fewer persons are employed in farming and farming-related activities.<sup>21</sup> In light of the sizeable portions of the nation's trade, economy, taxbase, workforce, and population dependant upon the resulting crops of those varieties, the consequences of the Court of Appeals' erroneous analyses and result clearly are national in effect and magnitude.

**III. REVIEW MUST BE GRANTED NOW TO PRESERVE THE PVPA AS AN INCENTIVE FOR INNOVATION IN NOVEL VARIETIES AND TO PREVENT IRREPARABLE DAMAGE TO THE NATION'S AGRICULTURE AND ECONOMY.**

It is clear that Congress intended this Court to review decisions of the Federal Circuit where circumstances warrant. *See, e.g., Cornelius v. Nutt*, 472 U.S. 648, 657 (1985); H.R. Rep. No. 312, 97th Cong., 1st Sess. 18-19 (1981). The Court of Appeals' egregious analytical errors in this case, and the overwhelming adverse effect of those legal errors on the continued development and global competitiveness of American agriculture, highlight that the questions presented are of critical national importance that warrant immediate review by this Court.

While this case concerns the proper interpretation of a federal statute within the exclusive jurisdiction of the Federal Circuit, it does not pose legal issues that are within the Federal Circuit's particular expertise or experience. The panel opinion in this case is the first opinion dealing with the PVPA that the Federal Circuit has published in the ten-plus years of that court's existence.<sup>22</sup> In

<sup>21</sup> The acreage planted in soybeans alone in this country amounts to over 58,000,000 acres, and the total acreage planted in the many other varieties/species in this country is much, much greater. More significantly, the sales revenues generated from the many varietal crops affected by this decision is well into the billions of dollars.

<sup>22</sup> *See* App. A, p. 4a ("The statutory interpretation of the PVPA crop exemption, 7 U.S.C. § 2543, is a case of first impression for this court.").

any event, the legal questions presented by this case require only the application of traditional tools of statutory construction, which is certainly not subject matter unique to the Federal Circuit.

This Court has granted certiorari in other statutory interpretation cases within the exclusive jurisdiction of the Federal Circuit where important federal interests or statutory schemes were at issue. *See, e.g., Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990) (determining whether medical devices were within the scope of the statutory exemption from patent infringement provided in 35 U.S.C. § 271(e)(1)); *United States v. Fausto*, 484 U.S. 439 (1988); *United States v. Morton*, 467 U.S. 822 (1984). Even in the absence of a direct conflict between a decision of the Federal Circuit and another federal appellate court, this Court has granted certiorari to review decisions of the Federal Circuit that have raised similar issues of special national importance. *See, e.g., Cardinal Chem. Co. v. Morton Int'l, Inc.*, 61 U.S.L.W. 4461, 4463 (1993).

Because appeals of cases arising under the PVPA are exclusive to the Federal Circuit under 28 U.S.C. § 1295, a direct conflict between the Federal Circuit and other circuits with respect to the interpretation of the PVPA in general, and section 2543 in particular, is not likely to develop. However, one indirect conflict already exists from a PVPA appeal decided before the Federal Circuit was created. In *Delta and Pine Land Co. v. Peoples Gin Co.*, 694 F.2d 1012, 1015-17 (5th Cir. 1983), *aff'g*, 546 F. Supp. 939 (N.D. Miss. 1982), the Fifth Circuit affirmed that sales of PVPA-protected seed must be made by the producing farmer directly to another such farmer without the active intervention of a third party in order to qualify for the exemption under section 2543.

Although the amount of PVPA seed that could be sold under section 2543 was not at issue, the Fifth Circuit's reasoning in the *Delta and Pine* case reveals that the



Federal Circuit misapprehended the purposes and policies of the PVPA.

The broader the construction given the exemption [in section 2543], the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains. The less time and effort that is invested, the smaller the chance of discovering superior agricultural products. If less time and effort is invested, long-term benefits to the farmer in the form of superior crops and higher yields will be lost. Although it may appear that the broadest reading of the exemption would benefit farmers today, it would be detrimental to their interests tomorrow.

Thus, the narrower reading of the exemption is more in keeping with Congress' primary objective.

694 F.2d at 1016. The clear disagreement between the two Circuit Courts over whether to interpret the exemption from infringement in section 2543 narrowly or broadly, in order to fulfill the intent of Congress, is another strong reason why a writ of certiorari should issue in the present case.

Prior to the Federal Circuit, no other federal court had interpreted the protections of the PVPA narrowly or the exemption from infringement in section 2543 broadly. The district court in this case realized it was "necessary . . . to interpret the statute in a manner which will dictate that the intent of Congress in enacting the PVPA will be accomplished." App. B, p. 20a. The district court in *Delta and Pine* stressed that "[s]ection 2543 must . . . be construed in such manner as not to frustrate the declared purposes of the [Act]." 546 F. Supp. at 939. On appeal, the Fifth Circuit confirmed that section 2543 "was not intended to provide farmers with unlimited insulation from the negative side effects of the Act." 694 F.2d at 1016. In direct contrast, the Federal Circuit's analysis and outcome in this case clearly do not comport with the Act and its stated purposes.

The need for review on writ of certiorari is further evidenced by the substantial conflict that this case created within the Federal Circuit as to the proper interpretation of section 2543. Asgrow's suggestion for rehearing in banc was declined by a single vote. Notably, five of the nine active judges not on the original panel voted to rehear the case after seeing the legal analysis in this petition for the first time in Asgrow's in banc suggestion. Judge Newman issued a sharp dissent that outlined numerous errors in the interpretation, analysis, and result reached by the panel. App. C, pp. 30a-38a. Even Judge Lourie, a member of that panel, would not join much of what the majority took upon itself to address and decide. App. A, p. 14a.

In light of the far-reaching and clearly erroneous interpretation of section 2543 in this case, there is virtually no chance the Federal Circuit's own precedent will be able to develop in a manner that will overcome the devastating impact of this single decision. If the best possible outcome of a future suit to enforce PVPA rights will be to restrict persons to selling only half of their crop as seed, the owner's market for such varieties will still be overwhelmed by "legitimate" brown bag seed. In that situation, future infringement suits over brown bag seed sales could not protect an owner's PVPA rights. Thus, if the important questions of federal law raised by this petition are ever to be corrected, they need to be addressed by this Court now.

The PVPA itself, the private plant breeding industry, and the nation's agriculture should not be left crippled by "a travesty of statutory interpretation" merely because the meaning of the statutory language has proved to be somewhat elusive prior to reaching this Court. In light of the striking disagreement and confusion among the learned judges (and attorneys) that have already attempted to pursue the words of section 2543 to their proper and intended meaning, this Court should grant the

requested writ to clarify and settle the correct interpretation of this important federal statute.

### CONCLUSION

The legal questions raised by this petition are vital to upholding the purposes of the PVPA, and to preserving the viability and continued existence of the plant breeding industry in the United States. Proper resolution of these questions is critical to the future ability of the American farmer to compete in the increasingly-global agricultural marketplace, and to ensure a continued supply of new, improved, and low-cost agricultural products to the American consumer.

Simply put, Congress did not enact the law that the Court of Appeals legislated through its erroneous interpretation of section 2543. Moreover, the ramifications of not granting certiorari in this case would be immense. For all of the reasons set forth herein, Petitioner respectfully requests that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

*Of Counsel:*

BRUCE STEIN  
ROBERT A. ARMITAGE  
SIDNEY B. WILLIAMS, JR.  
THE UPJOHN COMPANY  
7000 Portage Road  
Kalamazoo, Michigan 49001  
(616) 323-4000  
LAWRENCE C. MAXWELL  
TRABUE, STURDIVANT &  
DEWITT  
511 Union Street  
Nashville, Tennessee 37219  
(615) 244-9270

RICHARD L. STANLEY  
*Counsel of Record*  
JOHN F. LYNCH  
ARNOLD, WHITE & DURKEE  
750 Bering Drive  
Suite 400  
Houston, Texas 77057  
(713) 787-1400  
*Counsel for Petitioner*  
*Asgrow Seed Company*

Dated: June 23, 1993



# **APPENDICES**

1a

APPENDIX A

UNITED STATES COURT OF APPEALS  
FEDERAL CIRCUIT

---

No. 92-1048

ASGROW SEED COMPANY,  
v. *Plaintiff-Appellee,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEE'S,  
*Defendants-Appellants.*

---

Dec. 21, 1992

Rehearing Denied; Suggestion for  
Rehearing In Banc Declined  
March 25, 1993\*

---

Gary Jay Kushner and Mark D. Dopp, Hogan & Hartson, Washington, DC, were on the brief, for amicus curiae, American Seed Trade Ass'n, Northrup King Co., Dole Fresh Vegetables, Inc. and Bud Antle, Inc. and The Agrigenetics Co.

Richard L. Stanley and John F. Lynch, Arnold, White & Durkee, Houston, TX, were on the brief, for amicus curiae, Jacob Hartz Seed Co., Inc. With them on the brief was Mark F. Wachter, Monsanto Co., St. Louis, MO, of counsel.

Michael Joseph Roth, Des Moines, IA, was on the brief, for amicus curiae, Pioneer Hi-Bred Intern., Inc.

---

\* See 1993 WL 84941.

Jerome C. Hafter and Marian S. Alexander, Lake, Tindall, Hunger & Thackston, Greenville, MS, were on the brief, for amicus curiae, Delta and Pine Land Co. With them on the brief was E. Anthony Figg, Rothwell, Figg, Ernst & Kurz, Washington, DC, of counsel.

Bruce Stein, The UpJohn Co., Kalamazoo, MI, argued, for plaintiff-appellee. With him on the brief were Lawrence C. Maxwell and Mary Ellen Morris, Trabue, Sturdivant & Dewitt, Nashville, TN. Also on the brief were Robert A. Armitage and Sidney B. Williams, Jr., The UpJohn Co., Kalamazoo, MI, of counsel.

William H. Bode, William H. Bode & Associates, Washington, DC, argued, for defendants-appellants. With him on the brief was Robert A. Jaffe.

Constantine L. Trela, Sidley & Austin, Chicago, IL, was on the brief, for amicus curiae, DeKalb Plant Genetics. With her on the brief was Gina E. Brock. Also on the brief was Douglas Fisher, DeKalb Plant Genetics, DeKalb, IL, of counsel.

William Dennis Cross and Scott T. Forland, Morrison & Hecker, of Kansas City, MO, were on the brief, for amicus curiae, Agripro Biosciences, Inc.

Robert J. Jondle and Jeffrey I. Ihnen, Venable, Beatjer, Howard & Civiletti, Washington, DC, were on the brief, for amicus curiae, Golden Harvest Seeds, Inc.

Martin R. Glick and Todd E. Thompson, Howard, Rice, Nemerovski, Canady, Robertson & Falk, San Francisco, CA, were on the brief, for amicus curiae, Tanimura & Antle, Inc.

Stanley D. Schlosser, Foley & Lardner, Alexandria, VA, was on the brief, for amicus curiae, Stoneville Pedigreed Seed Co. With him on the brief was Patricia D. Granados, of counsel.

Before LOURIE, Circuit Judge, SMITH, Senior Circuit Judge, and RADER, Circuit Judge.

RADER, Circuit Judge.

Dennis and Becky Winterboer appeal a permanent injunction and order granting Asgrow Seed Company's motion for summary judgment. The United States District Court for the Northern District of Iowa held that 7 U.S.C. § 2543 (1988) (the crop exemption) of the Plant Variety Protection Act (PVPA or Act) quantitatively limits a farmer's sale of PVPA seed to the amount of seed necessary to grow another crop (ensuing crop limitation). *Asgrow Seed Co. v. Winterboer*, 795 F.Supp. 915, 22 USPQ2d 1937 (N.D.Iowa 1991). Because the district court misinterpreted the PVPA crop exemption, this court reverses and remands.

### BACKGROUND

The PVPA, 7 U.S.C. §§ 2321-2582 (1988), protects novel varieties of sexually reproduced seed, transplants, and plants. This protection extends to distinct, uniform, and stable new seed varieties. 7 U.S.C. § 2401. The developer of a novel variety obtains protection by acquiring a certificate of protection from the Plant Variety Protection Office. 7 U.S.C. §§ 2421, 2422, 2481-2483. A PVPA certificate grants the breeder the right to exclude others from "selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing . . . a hybrid or different variety therefrom." 7 U.S.C. § 2483(a). PVPA protection lasts for 18 years. 7 U.S.C. § 2483(b). The PVPA provides remedies for infringement of exclusive rights under the Act. 7 U.S.C. §§ 2541, 2561.

Asgrow, a subsidiary of The Upjohn Company, develops novel varieties and sells them to farmers. Asgrow has obtained PVPA protection for two novel soybean seed varieties, A1937 and A2243.

The Winterboers own and operate a farm in Clay County, Iowa. The Winterboers grow corn and soybeans.



The Winterboers sell soybean crops for food and feed. In addition, the Winterboers sell harvested soybean seed to other farmers who, in turn, use the seed to plant future crops.

Often farmers place harvested planting seed in plain brown bags for sale to other farmers. Therefore, "brown bag sales" refers to the sale of harvested seed from one farmer to another for planting future crops. The Winterboers engaged in brown bag sales by selling novel varieties A1937 and A2243 to other farmers.

Asgrow brought this infringement action against the Winterboers seeking damages and a permanent injunction. Asgrow seeks to enjoin the Winterboers' sale of seed harvested from crops grown with novel varieties A1937 and A2243. Asgrow alleges that the Winterboers' brown bag sales infringe its PVPA rights. The Winterboers admit selling brown bag seed harvested from Asgrow's novel varieties. However, the Winterboers deny all liability, alleging that their sales fit within the PVPA's crop exemption. 7 U.S.C. § 2543.

The district court conducted evidentiary hearings in March 1991. Both parties moved for summary judgment. On September 30, 1991, the district court granted Asgrow's summary judgment motion and issued a permanent injunction against the Winterboers.

### DISCUSSION

This court has exclusive jurisdiction over appeals involving the PVPA. 28 U.S.C. §§ 1295(a)(1), 1338 (1988). This court reviews the district court's grant of summary judgment *de novo*. *National Cable Television Ass'n v. American Cinema Editors, Inc.*, 937 F.2d 1572, 1576, 19 USPQ2d 1424, 1427 (Fed.Cir.1991). The statutory interpretation of the PVPA crop exemption, 7 U.S.C. § 2543, is a case of first impression for this court.

The PVPA grants patent-like protection for sexually reproduced plants.<sup>1</sup> The Act explains its purpose:

It is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end, so as to afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties. Constitutional clauses 3 and 8 of article I, section 8 are both relied upon.

7 U.S.C. § 2581. Thus, the 1970 Act provides exclusive rights for a term of eighteen years to encourage the development and marketing of novel plant varieties, thereby promoting the progress of agriculture. *See* H.R.Rep. No. 1605, 91st Cong., 2d Sess. 1-3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5082, 5082-84; S.Rep. No. 1138, 91st Cong., 2d Sess. 1 (1970). The Act provides incentives for seed companies to increase their research and development of novel seed varieties. *See* H.R.Rep. No. 91-1605 at 1. The PVPA's exclusive rights provide those incentives for innovation.

To enforce PVPA exclusive rights, the 1970 Act provided a remedy for infringement. Infringement is the unauthorized practice of a right granted exclusively to the PVPA certificate holder. 7 U.S.C. § 2541. Among other activities, the unauthorized sale of seed harvested from crops grown with novel varieties is infringement. 7 U.S.C. § 2541.

The crop exemption, however, provides a limited exemption from section 2541. Under specified circumstances, farmers may save and sell seed harvested from

<sup>1</sup> In 1930, forty years before enactment of the PVPA, the Plant Patent Act became law. 35 U.S.C. §§ 161-164 (1988). The Plant Patent Act provides patent protection to novel varieties of "non-sexually" reproduced plants. The 1970 Act, therefore, protects "sexually" reproduced plants, while the 1930 Act protects "non-sexually" reproduced plants. *See Diamond v. Chakrabarty*, 447 U.S. 303, 313, 100 S.Ct. 2204, 2210, 65 L.Ed.2d 144 (1980).

crops grown from PVPA seed. This lengthy and complex provision has several important clauses:

*Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title . . . .*

7 U.S.C. § 2543 (emphasis added).

Section 2541 defines infringement. Section 2543's introductory clause thus states that the crop exemption does not exempt a farmer from liability for two forms of infringement: sexually multiplying the novel variety as a step in marketing, or using the novel variety in producing (as distinguished from developing) a hybrid or different variety. See 7 U.S.C. § 2541(3) and (4). A farmer within the crop exemption remains exempt from the other acts of infringement, including selling the novel variety, offering it for sale, or dispensing the novel variety to another without notice of PVPA protection. See 7 U.S.C. §§ 2541(1) and (6), 2543.

*[I]t shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes . . . .*

7 U.S.C. § 2543 (emphasis added).

A farmer does not infringe by saving seed harvested from a crop grown from PVPA seed. However, the farmer must have obtained that PVPA seed by authority of the PVPA certificate holder and with the intent to grow a crop.

This language does not limit the amount of seed a farmer can save. Under these terms, however, a farmer who purchases PVPA seed from another farmer cannot save any seed from the crop grown with brown bag seed. Purchasers of brown bag seed do not obtain the protected seed "by authority of the [PVPA certificate] owner."

Thus, while an authorized purchaser of protected seed can save harvested seed under section 2543, a purchaser of protected brown bag seed cannot save any seed.

*[A]nd use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section. . . .*

7 U.S.C. § 2543 (emphasis added).

The crop exemption allows those farmers who may save seed to use it to produce a crop on their own farm or to sell it under limitations within the exemption. This provision thus permits, without threat of infringement, the sale of saved seed from crops grown with PVPA seed. To sell the saved seed, however, a farmer must comply with several statutory requirements.

*Provided, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes. . . .*

7 U.S.C. § 2543 (emphasis added).

The exemption places further conditions on brown bag sales of saved seed from a crop grown from PVPA seed. Both the buyer and seller of brown bag seed must be farmers. Moreover, their primary farming occupation for the crops produced from a novel variety must be to grow crops for sale as food or feed, rather than to grow crops for sale as seed. The exemption does not permit brown bag sales if either the buyer or the seller primarily grows crops from the novel variety to produce seed (for reproductive purposes). Rather both buyer and seller must primarily grow crops from the PVPA novel variety for consumption or other non-reproductive uses.



In this context, "primary" carries its customary meaning of "first in importance; chief; principal; main." *Webster's New World Dictionary*, 1069 (3d col. ed. 1988). This "primary" qualifier applies to the farming occupation of growing crops from novel seed varieties. The PVPA separately protects each novel seed variety. In addition, the various sections of the Act illustrate the rights available to specific novel varieties.

Indeed, the title of section 2543 is "crop exemption," not "primary farming exemption." This title and the context of the Act show that the PVPA applies this crop exemption on a crop-by-crop basis (i.e., on a "crops produced from a particular novel seed variety-by-crops produced from a particular novel seed variety" basis). The phrase "primary farming occupation is the growing of crops" applies to crops produced from a particular novel variety. Thus, buyers or sellers of brown bag seed qualify for the crop exemption only if they produce a larger crop from a protected seed for consumption (or other nonreproductive purposes) than for sale as seed.

Thus, to determine application of the crop exemption, a court must determine the amount of crops a farmer grows for sale to consumers and the amount of crops a farmer grows for brown bag sales to other farmers. If a farmer grows more crop from a protected seed variety for sale to consumers than for sale to other farmers for planting, that farmer qualifies under this requirement to buy or sell saved seed. The farmer who qualifies under the entirety of section 2543's requirements can then sell less than half of the crop grown from a specific novel variety as brown bag seed. A court must conduct this inquiry for each crop or variety of PVPA certified seed.

*[P]rovided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed*

*obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.*

7 U.S.C. § 2543 (emphasis added). The remainder of section 2543 requires compliance with applicable state laws and clarifies additional actions that may constitute infringement. 7 U.S.C. § 2543.

In sum, the section 2543 crop exemption does not give a farmer an unrestricted right to make brown bag sales of PVPA seed. Section 2543 contains the following limitations:

- a farmer remains subject to infringement under subsections 2341(3) and (4);
- a farmer may only save, use, or sell seed produced from or descended from seed obtained by authority of the PVPA certificate owner for seeding purposes;
- a farmer selling a novel variety must primarily grow crops from that seed for consumption;
- a farmer acquiring a novel variety must primarily grow crops from that seed for consumption;
- a farmer who acquires a novel variety in a brown bag sale can neither save nor sell seed harvested from that seed;
- the sale must comply with state laws; and
- a farmer cannot divert seed originally sold for consumption to planting purposes.

The legislative record accompanying the PVPA underscores the purposes of the crop exemption. The reports of the committees of both houses of Congress stated:



This section authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; to save seed from such crop for future use or planting on the farm; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed for reproductive purposes to other persons so engaged.

H.R.Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970), reprinted in 1970 U.S.C.C.A.N. 5082, 5093; S.Rep. No. 1138, 91st Cong., 2d Sess. 12 (1970). At no point did the legislative context for the text of the 1970 Act suggest that the crop exemption contains an ensuing crop limitation.

#### Ensuing Crop Limitation

The district court erred in determining that crop exemption of section 2543 contains an ensuing crop limitation on the amount of seed a farmer can save. The trial court incorrectly read the crop exemption to limit brown bag sales of novel varieties to the maximum amount of seed the selling farmer would save to plant another crop of like size. *Asgrow*, 795 F.Supp. at 919, 22 USPQ2d at 1940. In arriving at its conclusion, the district court stated:

The language of the statute is that, "it shall not infringe any right hereunder for a person to save seed produced by him . . . for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for the sale as provided in this section."

*Asgrow*, 795 F.Supp. at 918, 22 USPQ2d at 1939. The district court determined that "for seeding purposes" modified the verb "save." The court concluded that a farmer could only "save" the amount of seed necessary for "seeding purposes" for ensuing crops.

Essentially the district court restricted the amount of saved seed a farmer may sell to other farmers to a quantity equivalent to one bushel per acre of the seed produced from a protected variety. With respect to soybean farmers such as the Winterboers, this quantity is approximately 1/45 of the farmer's total crop. The Act nowhere contains this restriction.

The district court's reading overlooks important phraseology within section 2543. In the critical passage of the district court's opinion shown above, the ellipses indicate the omission of important language necessary for a correct interpretation. Thus, the court incorrectly concluded that the phrase "for seeding purposes" modified the verb "save." Reading the entire passage without critical omissions shows that "for seeding purposes" modifies the verb "obtained," not "saved":

[I]t shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes . . . .

7 U.S.C. § 2543. Thus, section 2543 does not contain any explicit limit that a farmer can save and sell only as much seed as necessary to plant an ensuing crop.

Examining the entirety of section 2543, this court notes that the phrase "for seeding purposes" modifies the verb "obtained" in two other clauses in the section:

A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement.

7 U.S.C. § 2543 (emphasis added). Thus, the entire context of section 2543 shows that "for seeding purposes" does not modify "save" and create a narrow ensuing crop limitation on the crop exemption. This court recognizes that, without meaningful limitations, the crop exemption could undercut much of the PVPA's incentives. The Act, as written, however, contains no ensuing crop limitation as determined by the District Court.

In sum, section 2543 does not give farmers a blanket right to sell saved seed. Rather the crop exemption has several limitations. A farmer must meet each of these requirements to qualify for the exemption. Because the district court granted Asgrow's motion for summary judgment based on an ensuing crop limitation in section 2543, this court must reverse. On remand, the trial court has the opportunity to develop a full record on the Winterboers' eligibility under the crop exemption.

#### Section 2541(3)

Under section 2541(3), a farmer infringes the exclusive rights in protected seed by sexually multiplying the novel variety as a step in marketing (for growing purposes) the variety. In two explicit references, the Act clarifies that the crop exemption does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541. Thus, although section 2543 permits farmers to make certain defined brown bag sales without the threat of infringement, section 2541(3) does not permit them to market novel varieties.

An expansive reading of the term "marketing" would swallow the entire crop exemption. The crop exemption explicitly permits farmers to make certain brown bag sales of novel varieties. Read alongside subsection (3) of section 2541, section 2543 permits direct farmer-to-farmer sales where both farmers satisfy the limits of the crop exemption. "Marketing" in the context of the PVPA means extensive or coordinated selling activities, such as

advertising, using an intervening sales representative, or similar extended merchandising or retail activities. This form of marketing of sexually multiplied novel varieties violates exclusive rights under the Act, without regard to the crop exemption. On remand the trial court may again revisit and develop a full record on whether the Winterboers meet the other requirements of the Act.

#### Notice

Under section 2541(6), it is infringement to:

(6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received; or . . . .

Thus, an individual who transferred a novel variety to another without notice of the transfer of protected seed would infringe exclusive PVPA rights. Section 2543, however, exempts farmers who make limited brown bag sales from this requirement. Section 2543 states:

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder . . . .

Because subsection (6) is not included as an exception to the crop exemption, a qualifying sale under section 2543 remains exempt from the notice requirement. Therefore, the crop exemption exempts farmers from liability under subsection (6) (as well as subsections (1), (2), (5), (7) and (8)) of section 2541.

Once again, the limited record on appeal permits no ultimate conclusion about whether the Winterboers' sales were exempt under section 2543. If those sales were exempt, however, the notice requirement would not apply.



## CONCLUSION

This court holds that the district court erred in reading an ensuing crop limitation into the crop exemption of the PVPA. Rather the PVPA crop exemption contains the limitations set forth in the statute. Therefore, this court reverses the district court's grant of summary judgment. This action vacates the permanent injunction against the Winterboers. This court also denies Asgrow's motion to strike. This case is remanded to the district court.

## COSTS

Each party shall bear its own costs.

REVERSED AND REMANDED.

LOURIE, Circuit Judge, concurring.

I concur in the result of this case and in the panel's discussion of the limitation on saved seed which was the basis for the district court's decision.

However, I cannot join the remainder of the opinion because it attempts to characterize and interpret other parts of this complex statute that I believe are not before us and have not been briefed.

## APPENDIX B

UNITED STATES DISTRICT COURT  
N.D. IOWA, W.D.

---

Civ. No. C91-4013

THE ASGROW SEED COMPANY,  
*Plaintiff,*

v.

DENNY WINTERBOER and BECKY WINTERBOER  
d/b/a DEEBEE'S,  
*Defendants.*

---

Sept. 30, 1991

On Motion For Clarification Nov. 14, 1991.

---

Lawrence C. Maxwell, Trabue and Sturdivant, Nashville, Tenn., and Bruce Stein, Upjohn Co., Kalamazoo, Mich., for plaintiff.

William H. Bode, William H. Bode Associates, Washington, D.C., and Daryl L. Hecht, Crary, Huff, Raby, Inkster, Hecht and Sheehan, P.C., Sioux City, Iowa, for defendants.

DONALD E. O'BRIEN, Chief Judge.

This matter comes before the court pursuant to both parties' motions for summary judgment. After careful consideration of the oral and written arguments this court sustains the plaintiff's motion and denies the defendants' motion.

## FACTS

This is an action under the Plant Varieties Protection Act ("PVPA" or the "Act"). *See*, 7 U.S.C. §§ 2321-2582. In order to avail oneself of the protection of the Act, the developer of a novel plant variety<sup>1</sup> must apply to the Plant Variety Protection office for a Certificate of Plant Variety Protection. 7 U.S.C. § 2482. A certificate grants the breeder the right to exclude others from "selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing . . . a hybrid or different variety therefrom . . ." 7 U.S.C. § 2483(a). The protection lasts for 18 years. 7 U.S.C. § 2483(b).

This action was brought by Asgrow Seed Company against Dennis and Becky Winterboer. The Winterboers are family farmers in Clay County, near Milford, Iowa. The Winterboers have incorporated under the name D-Double-U Corporation, and do business under the name DeeBee's Feed and Seed. Asgrow is a subsidiary of Upjohn, and is in the business of developing agricultural seed and selling it to farmers.

Plaintiff alleges that the defendants engage in "brown-bagging." This refers to a process in which a farmer purchases seed from a company engaged in the development of plant seed. They then plant the seed, harvest it, clean it, and place it in non-descriptive brown bags for sale. Hence the term "brown-bagging."

In December of 1990, Asgrow through an agent, Mr. Ness, went to the Winterboer farm to purchase soybeans. Mr. Winterboer informed Mr. Ness that he had soybean seed for sale that was just like Asgrow varieties A1937 and A2234. Mr. Winterboer called his "just-like" varieties 1938 and 2235. Mr. Ness purchased 20 bags of 1938

<sup>1</sup> A novel variety is defined in 7 U.S.C. § 2401(a) as a variety whose essential and distinctive characteristics will remain unchanged when sexually reproduced.

and 20 bags of 2235. Asgrow took the seeds purchased from the Winterboers to Dr. Matson, Ph.D., a plant biologist employed by Asgrow, who performed tests on the seed. Dr. Matson determined that the seed tested was Asgrow A1937 and A2234.

Asgrow sought an injunction based on the PVPA to prohibit the Winterboers from selling this seed. After two hearings before this court the parties agreed to enter into an injunction. The injunction provided that the defendant would not sell any seed for the 1991 planting season. No representations were made to this court concerning the actions defendants would take with regard to seed for the 1992 crop year.

Asgrow alleges that the defendants' activities which infringe Asgrow's PVPA certificates are:

1. Unauthorized selling. *See*, 7 U.S.C. § 2541(1).
2. Sexually multiplying the varieties as a step in marketing the varieties. *See*, 7 U.S.C. § 2541(3).
3. Dispensing in a form which can be propagated without notice as to being a protected variety under which it was received. *See*, 7 U.S.C. § 2541(6).<sup>2</sup>

## DISCUSSION

It is an infringement of the rights of the owner of a novel variety to perform any of the following acts without the owner's authorization:

- (1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or possession of it;

. . . . .

<sup>2</sup> This court interprets this language to require that if a farmer does sell saved seed to another farmer he must label it as a protected variety.



(3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or

.....

(6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received;

.....

#### 7 U.S.C. § 2541.

Defendants do not dispute that Asgrow was the owner of a novel variety protected by the Act, nor do they dispute, for purposes of this motion, that they had sold the progeny of the novel variety. However, they argue that they are exempt from the operation of § 2541 by the "farmer exception" provided in 7 U.S.C. § 2543. This section provides that no infringement occurs if:

... a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes ... [sells] such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

7 U.S.C. § 2543. Defendants allege that virtually all of their crops (almost 80%) are sold for other than reproductive purposes, thus they fall within the exception. They also claim, in direct conflict with the plaintiff's allegation, that they have complied with state law.

Plaintiff alleges that the defendants' actions do not fall within the farmers' exemption contained in the PVPA. The farmers' exemption provides:

Except to the extent that such action may constitute an infringement under subsection (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed

in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale in channels usual for such other purposes, of seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.

7 U.S.C. § 2543 (emphasis in original). Plaintiff alleges that the exception limits the amount of seed that can be saved as the amount necessary for seeding purposes. Plaintiff alleges this is the proper definition to give the phrase "saved seed."

The duty of this court is to determine and give effect to the intent of Congress. In *Ozawa v. U.S.*, 260 U.S. 178, 43 S.Ct. 65, 67 L.Ed. 199 (1922), the U.S. Supreme Court held:

It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if nec-

essary, the literal meaning in order that the purpose may not fail. [citations omitted].

*Id.* at 194, 43 S.Ct. at 67. It is therefore necessary for this court to interpret the statute in a manner which will dictate that the intent of Congress in enacting the PVPA will be accomplished.

Although the legislative history, and thus Congressional intent, on the PVPA is limited, at least one circuit court has determined that Congress intended to create a narrow exemption when creating the farmer exemption. In *Delta and Pine Land Company v. People Gin Company*, 694 F.2d 1012 (5th Cir.1983), the Fifth Circuit held:

In purpose and operation, the farmer exemption appears to be at odds with the primary purpose of the Act. While the main body of the Act assures developers of novel varieties the exclusive right to sell and reproduce that variety, the crop exemption dilutes that exclusivity by allowing individual farmers to sell the protected variety without liability. *The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains.* The less time and effort that is invested, the smaller the chance of discovering superior agricultural products. If less time and effort is invested, long-term benefits to the farmer in the form of superior crops and higher yields will be lost. Although it may appear that the broadest reading of the exemption would benefit farmers today, it could be detrimental to their interest tomorrow.

*Thus, the narrower reading of the exemption is more in keeping with Congress' primary objective.* Such a reading creates the greatest amount of internal harmony in the overall statutory scheme. [citations omitted]. We therefore conclude that Congress did not intend for the crop exemption to cover every sale from one farmer to another.

*Id.* at 1016 (emphasis supplied). In the above quoted *Delta and Pine Land Company* case, the court also held that the farmer exception required that sales be made directly from farmer to farmer, thereby prohibiting the use of a middleman to facilitate the sale, despite the fact that the Act contained no such limiting language. *Id.* at 1017. *Delta and Pine Land Company* did not limit the quantity of seed that could be sold in farmer to farmer sales as this court is now doing.

In 7 U.S.C. § 2543 Congress specifically protected the historical and traditional right of small farmers like the Winterboers to make seed sales to fellow farmers. However, the intent of Congress in enacting the PVPA was not to give a farmer an unrestricted right to sell seed. *See, Delta and Pine Land Company* at 1016 ("the crop exception was not intended to provide farmers with unlimited insulation from the negative side effects of the Act"). If so, Congress would have not included the phrase "saved seed" in the code section. The inclusion of the modifier "saved" in describing the amount of "seed" a farmer is allowed to sell indicates a clear congressional intent to place limits on the amount of seed a farmer can sell to other farmers under the Act.

The language of the statute is that, "it shall not infringe any right hereunder for a person to save seed produced by him . . . for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section . . ." Reading the statute as a whole, and giving effect to the intent of Congress, this court concludes that the intent of Congress in enacting this section was to allow a farmer to save seed for his planned seeding purposes. The exception allows a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent crop year. For example, if a farmer raised 500 acres of soybeans, had farmed a total of 1000 tillable acres in that crop year, but could reasonably expect to plant a total of 1500 acres of the protected variety in



the subsequent crop year, the maximum amount of seed that could be classified as "saved seed" would be 1500 bushels.<sup>3</sup> A farmer would be limited to saving a combined total of 1500 bushels of the current year's crop. This would allow a farmer to sell the seed not actually planted if market conditions necessitated a change in planting plans.

Although this interpretation of "saved seed" restricts the number of bushel farmers will be able to sell to one another, this court is convinced that the purpose of Congress in enacting the PVPA was to protect the developer of a new line of seed and to allow a farmer to sell the prodigy of the novel variety as limited in the example set out above. This court is aware that a Congressman who was instrumental in the passage of the Act expressed the opinion that a developer would be the only one who could sell the novel seed. As was stated by Rep. Poage:

I do not think there is any doubt that it [enactment of the PVPA] will mean if somebody produces a seed that gives better results than anybody else's seed, and if he is the only one who can sell that seed, then he will get more for it. . . . This is the only way we know to get people to invest their time and money. . . . So in the long run we believe there will be beneficial results for the producers and farmers.

116 Cong.Rec. 40,295-40,303, 40295 (daily ed. Dec. 8, 1970) (emphasis supplied). In a nutshell the defendants' position is that "we can sell all the novel variety that we have grown so long as we sell it to other farmers

<sup>3</sup> This assumes that soybeans will be planted at the rate of one bushel per acre. This court realizes that allowing a farmer to save an amount of seed reasonably necessary to plant the next years crop may lead to situations where courts will be required to determine what amount of seed is reasonably necessary to plant the next year's crop. However, determining if a person's primary occupation is farming is also a factual question which needs to be determined on an *ad hoc* basis.

and follow state law." To allow such an expansive reading of the exception as the defendants espouse would dictate that the owner of the novel variety would not be the only one that could sell the seed. Clearly the intent in enacting the PVPA was to encourage companies to develop improved varieties of seed and to provide for these developers the right to protect this product from unauthorized sales by others. To allow the defendants to sell virtually unlimited amounts of the plaintiff's novel line of seed would lead to a result contrary to the intent of the statute.<sup>4</sup>

This court is aware that placing limits on the amount of seed a farmer may sell to another farmer, rather than merely placing limits on the manner in which the sales may be made, as was done in *Delta and Pine Land Company v. People Gin Company*, *supra*, is a restrictive reading of the exception. However, this court is convinced that the intent of Congress in enacting the statute was to give farmers more choices, make American agricultural products more competitive in world markets, and thereby ultimately get superior products more resistant to disease and infestation and higher in overall yield and quality, and to assure the developers of novel varieties of sexually reproduced plants the exclusive right to sell, reproduce,

<sup>4</sup> This court realizes that the language "whose primary farming occupation is the growing of crops for sale for other than reproductive purposes" contained in 7 U.S.C. § 2543 may be construed by some as the limiting language in the statute. However, this language would still allow a person qualifying for the exception to sell approximately 40 times the amount of soybean seed bought from the developer of the novel variety. This assumption is logically deduced from the fact that one planted bushel of soybeans yields approximately 40 bushels of soybeans. *See, Plaintiff's Statement of Undisputed Facts*, ex. B. Such sales, if conducted by enough sellers, would dilute or completely eliminate any market for the developer of the novel variety. Such results would lead to decreased spending in the area of research and development. In the long run this would lead to detrimental results to producers and farmers.

import, or export such varieties. *See, 1970 U.S. Code Cong. & Admin. News*, 5082, 5082-83. Such an intent is thwarted when a developer's sales of such seed is diluted by the lower priced sales by those who have contributed nothing to the development of the novel variety.

### CONCLUSION

Saved seed shall be limited to the amount of the protected seed reasonably needed by the farmer who grew it to plant the number of acres of the protected variety, or its progeny, he or she needs in the upcoming crop year. Accordingly, this is the limit that a person qualifying for the "farmer exception" can save for planting and/or sale. Since defendants admittedly have sold much more than this amount of seed, their actions are violations of 7 U.S.C. § 2541(1), and (3). The defendants will not be permitted to continue selling seed in the method commonly referred to as "brown bagging."<sup>5</sup>

*Accordingly, it is ordered,*

1. Plaintiff's motion for summary judgment is sustained.
2. The plaintiff's request for a permanent injunction is sustained. The defendants are hereby enjoined from selling seed, except for saved seed, to other farmers and/or engaging in any form of "brown bagging."
3. Defendants' motion for summary judgment is denied.
4. A separate proceeding shall be held at the court's earliest convenience to determine damages in this matter.

<sup>5</sup> This court has ruled that the defendants violated the Plant Varieties Protection Act because most of their extensive sales, 10,000 bushels, do not fall within the farmer exception. This court will not rule on the allegations that the defendants violated the Iowa labeling law, because such a determination is not necessary to decide the issue of liability.

Both parties shall file briefs addressing 7 U.S.C. § 2567 and its potential effect on the amount of damages that could be awarded in this action.

### ON MOTION FOR CLARIFICATION

Plaintiff's timely motion for a clarification of this court's order of September 30, 1991 brings this matter before the court. After consideration of the written arguments the court finds that a clarification is warranted.

In the motion to clarify, plaintiff points out that a reading of the court's order, as a whole, reveals that footnote 2 and footnote 5 could arguably be read as being in conflict. In footnote 2 the court stated that:

This court interprets this language [7 U.S.C. § 2541(6)] to require that if a farmer does sell saved seed to another farmer he must label it as a protected variety.

In footnote 5 the court stated:

This court has ruled that the defendants violated the Plant Varieties Protection Act because most of their extensive sales, 10,000 bushels, do not fall within the farmer exception. This court will not rule on the allegations that the defendants violated the Iowa labeling law, thereby resulting in a violation of 7 U.S.C. § 2541(6), because such a determination is not necessary to a determination of liability.

After careful review the court agrees with the plaintiff. Plaintiff argues that the court's use of the word "thereby" in footnote 5 could be construed as meaning that there is no violation of 7 U.S.C. § 2541(6) unless state labeling law is violated. As set out in the body of the order the court found a violation of the Federal Act and concluded that a determination of the alleged violation of the labeling requirement was not necessary.



The court now determines that through oversight, an error, as contemplated by Federal Rule of Civil Procedure 60(a), has been made which should be corrected. The said correction does not alter in any way the matter now on appeal. Therefore, footnote 5 on page 10 of this court's order of September 30, 1991 is stricken and the following shall be substituted in lieu thereof:

[Editor's Note—Substitution made in the published opinion.]

In short, what the court was deciding in the order was that the question of any violation of the labeling portion of the Plant Variety Protection Act need not be addressed, as a violation was found under other sections.

IT IS SO ORDERED.

# APPENDIX C

## UNITED STATES COURT OF APPEALS FEDERAL CIRCUIT

---

No. 92-1048

ASGROW SEED COMPANY,  
*Plaintiff-Appellee,*  
v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEE'S  
*Defendants-Appellants.*

---

March 25, 1993.

Opinion of Circuit Judge Rader  
Concurring in Denial of Rehearing  
En Banc March 29, 1993

---

Opinion of Circuit Judge Newman  
Dissenting from Denial of Rehearing  
En Banc March 25, 1993

---

Appealed from: U.S. District Court for the Northern District of Iowa; Chief Judge O'Brien.

Richard L. Stanley and John F. Lynch, Arnold, White & Durkee, Houston, TX, were on the Petition for Rehearing and Suggestion for Rehearing En Banc, filed by plaintiff-appellee. Also on the petition were Bruce Stein, Robert A. Armitage and Sidney B. Williams, Jr.,

The UpJohn Co., Kalamazoo, MI, and Lawrence C. Maxwell, Trabue, Sturdivant and Dewitt, Nashville, TN.

William H. Bode and Robert A. Jaffe, William H. Bode & Associates, Washington, DC, were on the defendants-appellants response to plaintiff-appellee's Petition for Rehearing and Suggestion for Rehearing En Banc.

### ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on April 2, 1993.

Chief Judge NIES, Circuit Judge NEWMAN, Circuit Judge ARCHER, Circuit Judge MICHEL and Circuit Judge PLAGER would rehear the appeal in banc.

RADER, Circuit Judge, concurring in the denial of rehearing en banc.

[Filed March 29, 1993]

Because *Asgrow Seed Co. v. Winterboer*, No. 92-1048 (Fed.Cir. Dec. 21, 1992), correctly interpreted the Plant Variety Protection Act, this court properly declined to rehear the case *en banc*. The Act has a vital and important purpose:

to provide *the indicated protection* for new varieties . . . so as to afford adequate encouragement for re-

search, and for marketing when appropriate, to yield for the public the benefits of new varieties.

7 U.S.C. § 2581 (1988) (emphasis added). This court in *Asgrow* acknowledged and respected that purpose.

Section 2543, the crop exemption, helps define "the indicated protection" of the Act. The exemption permits farmers to save, use, and sell seed. 7 U.S.C. § 2543 (1988). The exemption specifically excludes (and thus farmers may not engage in) sexually multiplying seed as a step in marketing. 7 U.S.C. § 2541(3) (1988).

As used in the Act, marketing is not simply selling. The Act uses both words.\* The Act prohibits "sexually multiply[ing] the novel variety as a step in marketing." *Id.* The Act permits, under specified circumstances, selling. 7 U.S.C. § 2543. The Act states:

[I]t shall not infringe any right hereunder for a person to save seed . . . for sale as provided in this section. . . .

*Id.* Indeed if selling and marketing were synonymous, then much of the crop exemption would have no meaning. The Act, however, includes a crop exemption to permit farmers to make brown bag sales.

The district court erred in reading an ensuing crop limitation into the crop exemption. The Act does not limit the amount of seed a farmer may sell to the amount necessary to plant another crop. The Act does not say a farmer may sell seed "saved . . . for seeding purposes." The Act says a farmer may sell seed "produced by him

\* The same section of the Act that prohibits "sexually multiply[ing] the novel variety as a step in marketing" also prohibits separately "sell[ing] the novel variety, or offer[ing] it for sale." 7 U.S.C. § 2541(1), (3). Selling is different from marketing. Although the selling subsection is subject to the crop exemption, the marketing subsection is not. Section 2543 makes this distinction precisely because the crop exemption permits, under specified circumstances, brown bag selling.



from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes." *Id.* Under normal rules of syntax, "for seeding purposes" modifies "obtained." Three different clauses of the crop exemption feature the words "for seeding purposes" as modifiers of "obtained." At no place in the exemption does "for seeding purposes" modify "saved."

PAULINE NEWMAN, Circuit Judge, dissenting from denial of the suggestion for rehearing en banc.

[Filed March 25, 1993]

The panel's interpretation of the "farmer's exemption" provision of the Plant Variety Protection Act is of first impression in this court. The panel, reversing the district court, 982 F.2d 486, has reached an interpretation of this provision that is contrary to the statute and its purpose.

The importance of the issue merits the attention of the full court, for it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture. If this statutory construction is to be adopted, it should be done *en banc*.

#### *Statutory Interpretation*

The legislative purpose was uncontroversial, and unambiguously recorded:

to encourage the development of novel varieties of sexually reproduced plants and to make them available to the public, providing protection available to those who breed, develop, or discover them, and thereby promoting progress in agriculture in the public interest, . . .

H.R.Rep. No. 1605, 91st Cong., 2d Sess., at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5082, 5082. This purpose was not limited to expression in the legislative history; it was enacted in the statute itself:

7 U.S.C. § 2581 It is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end, so as to afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties.

Before enactment of the Plant Variety Protection Act in 1970, developers of sexually reproduced plants (plants grown from seed) were by statute excluded from patent protection, whereas asexually reproduced plants (propagated, *e.g.*, by grafting) were covered by Chapter 15 of the Patent Act. Without some form of protection against reproduction and sale of the seed, developers of new varieties of seed-propagated plants could not recapture their often-extensive research and development costs. Thus the financial incentive for innovation in new varieties in agriculture was absent. The twelve briefs of *amici curiae*, apparently representing the entire seed industry, report how little R & D was done by private enterprise on seed-propagated plants.<sup>1</sup> The *amici* discuss the problems of taxpayer-supported (USDA) plant variety breeding for lack of marketing resources, and the purpose of the Act to obtain industry involvement.

The Plant Variety Protection Act was intended to invigorate industrial development of new varieties, in the

<sup>1</sup> For example, *amicus curiae* Agripro Biosciences Inc. states that its new product research program, with 111 full time employees and an annual expenditure of six million dollars, "came into existence only after the enactment of the Plant Variety Protection Act", and that development of a new variety takes 8 to 12 years.

Agripro states that it now markets 28 varieties of wheat, all developed in its laboratories after the enactment, and estimates that in the nation over 3,000 new crop varieties have been developed in programs that began after enactment of the Plant Variety Protection Act, as compared with 150 new varieties in the ten years before enactment.

national interest. This was designed to be achieved by providing limited exclusivity to the plant breeder:

7 U.S.C. § 2483 [A certificate of plant variety protection gives the breeder the right] to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom. . . .

The Plant Variety Protection Act provided a measure of control to the commercial developer of a new plant variety, and thus provided the incentive to such development. Upon meeting the requirements of the Act, the plant breeder had the right to exclude others from reproducing or selling the seed for reproductive purposes, with the pragmatic exception that farmers could continue the practice of saving enough seed from one crop to plant the next.

The Act was not designed to permit farmers to grow and sell seed of certified varieties as a business, to enter the commercial seed business in competition with the creator of new variety.<sup>2</sup> The panel majority, by allowing up to half of a farmer's crop to be sold as seed, authorizes this practice, in a travesty of statutory interpretation.

The statute was not designed to place farmers in the seed business; it was designed to strengthen American agriculture by improving the quality and yield of crops for purposes of nutrition and value to the consumer, and to aid in international competitiveness.

<sup>2</sup> According to *amicus curiae* Jacob Hartz Seed Co., a single bushel of soybean seed will produce between 25 and 45 bushels of soybeans. If only half of the crop is sold as seed in successive years, in three years this would allow the farmer to place on the market between 2,037 and 11,655 bushels of seed. The *amicus* American Seed Trade Association calculated that a single soybean seed, after three crops, would produce 27,000 seeds.

### *The Crop Exemption*

The Act permits the sale of seeds for non-reproductive purposes such as food, animal feed, or in the production of industrial products such as oil or ethanol. The Act also exempts certain shipping, research, and farming activities from some provisions of the act. The "crop exemption" or "farmer's exemption" is the focus of this lawsuit.

The farmer's exemption permits farmers to continue their usual practice of saving part of their crop as seed for replanting on their farms, and to use seed crops for non-reproductive purposes such as animal feed. The exemption also permits a farmer who does not use the saved seed himself to sell it to another farmer, provided that neither farmer is in the seed business. The issue in this case is whether the statute permits more than this limited amount of sale of certified seed. I believe that the panel erred in its interpretation of the relevant provision:

7 U.S.C. § 2543 Right to save seed; crop exemption

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A



bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section § 2567 of this title that his actions constitute an infringement.

There is no dispute that farmers may save seed for their own use, harvested from crops grown from legitimately obtained seed of protected varieties. The statement in § 2543 that a person may "save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes" establishes the category of "saved seed", to which the statute subsequently refers ("such saved seed"). According to § 2543 this saved seed may be used "in the production of a crop for use on his farm, or for sale as provided in this section". Thus we reach the questions of whether the seed the Winterboers sold qualified as "saved seed" and, if so, did they sell more of it than the statute permits.

The first clause of § 2543 provides that the crop exemption does not apply to activities that infringe pursuant to subsections (3) and (4) of section 2541. Section 2541 (3) is one of eight enumerated acts that infringe a certificate owner's rights:

7 U.S.C. § 2541. . . . it shall be an infringement of the rights of the owner of a novel variety to perform without authority, any of the following acts . . .

\* \* \* \*

(3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety . . .

Thus the crop exemption of § 2543 does not apply to a novel variety that is sexually multiplied as a step in marketing the variety for growing purposes. Crops grown to be marketed as seed are an infringement, by § 2541(3). Thus crops grown to be marketed as seed are excluded from the crop exemption.

The panel opinion draws a distinction between the word "marketing", as used in § 2541(c), and sales under the crop exemption, apparently believing that the Winterboers may sell their crop as seed as long as they do not "market" it (by engaging in ancillary activities such as advertising). This is a curious construction, for although the niceties of language can always tempt the aficionado, in this case there is no basis for departing from the ordinary, contemporary, common meaning of "marketing" as "selling".<sup>3</sup> Unless otherwise defined the words in a statute are given their ordinary, contemporary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580-81, 95 S.Ct. 1180, 1184-85, 43 L.Ed.2d 469 (1975)). There is no basis for the panel's conclusion that Congress silently intended "marketing" to be limited to "extensive or coordinated selling activities", and thus to be different from "selling".

The Winterboers planted 265 acres of certified soybean varieties, and sold the entire usable crop, 10,529 bushels, as seed; enough to plant 10,000 acres. It is undisputed that the Winterboers grew this soybean crop primarily for sale as seed. As discussed *supra*, growing a crop for seed involves "sexually multiplying the novel variety as a step in marketing (for growing purposes) the variety".

<sup>3</sup> The dictionary defines the verb form of "market" as synonymous with "sell". *E.g.*, Webster's Ninth New Collegiate Dictionary (Merriam-Webster, 1984) ("market *vi* (1635): to deal in a market [-] *vt* 1: to expose for sale in a market 2: SELL"); Webster's Third New International dictionary (Merriam-Webster, 1976) ("*vt* 1: to expose for sale in a market: traffic in: sell in a market 2: SELL"). [Capital letters indicate a synonym.]

Their activity thus infringed Asgrow's rights under § 2541 (3). Applying the first clause of § 2543, the seed the Winterboers sold did not qualify as saved seed, hence its sale was not permitted pursuant to the crop exemption. No other section of the Act authorizes the Winterboers' sale of seed for reproductive purposes.

The district court held, applying § 2543, that the amount of seed that may be sold is limited to the amount permitted to be "saved . . . for seeding purposes", and that the amount of seed that could be saved for seeding purposes was limited to what would be necessary for the ensuing crop planting "on his farm", quoting from § 2543. The panel holds that the farmer may sell up to half of the crop as seed, stating that the only limit is whether the "primary farming occupation is the growing of crops for sale for other than reproductive purposes". The panel has misinterpreted this text, for this provision is directed to whether a farmer may sell *any* saved seed, not how much seed the farmer may sell.

To qualify for the crop exemption, the seed must not have been grown for the purpose of sale as seed (§ 2541 (3)). When a farmer saves only enough seed to replant the crop on the farm, and then foregoes such replanting, it may be inferred that such seed is "saved seed", and may be sold. If the farmer wishes to sell more, he must establish that the seed was grown and saved for use other than for sale as seed (*e.g.*, for animal feed). The farmer who sells more seed of a certified variety than he could have planted on his farm has a long row to hoe in proving that the crop was not grown for sale as seed.

The House Report pertaining to § 2543 states:

This section authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes, to save seed from such crop for future use or planting on the farm; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell

such seed for reproductive purposes to other persons so engaged.

H.R.Rep. No. 1605, *supra*, at 11, reprinted in 1970 U.S.C.C.A.N. at 5093. This explains the farmer's options under the crop exemption: the crop may be sold for purposes other than use as seed; seed may be saved for future use or planting by the farmer; or such saved seed may be sold to other farmers for use as seed.<sup>4</sup>

The discontinued research projects and abandoned varieties due to massive "brown bag" sales, reported in detail by various *amici curiae*, may not interest farmers such as the Winterboers, who have opportunistically entered the seed business for certified varieties. It is the greater national interest that suffers from this eviscerated incentive to innovate in plant varieties. New disease resistant crops, for example, may lower food costs and be more competitive in international trade; but they may be of less short term impact on individual farmers.

If a statute is "insufficiently precise", it is the court's obligation to serve the statutory purpose. *United States v. Bacto-Unidisk*, 394 U.S. 784, 799, 89 S.Ct. 1410, 1418, 22 L.Ed.2d 726 (1969) (citing *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119, 124-25, 73 S.Ct. 981, 984-85, 97 L.Ed. 1494 (1953)). This statute was designed to per-

<sup>4</sup> Witnesses in the hearings before both the House and Senate committees responded to questions from members with the assurance that the proposed legislation would permit farmers to save seed to replant their crops or for other use on the farm, but that the farmers could not sell this seed to others for use as seed. No witness argued that farmers should have greater rights to sell certificated crop seeds. See generally *Plant Variety Protection Act: Hearings on S. 3070 Before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry*, 91st Cong., 2d Sess. (1970); *Plant Variety Protection: Hearings on H.R. 13424, H.R. 13631, H.R. 13658, H.R. 13901, H.R. 14332, and H.R. 15226 Before the Subcommittee on Departmental Operations of the House of Representatives Committee on Agriculture*, 91st Cong., 2d Sess. (1970).



mit continuation of the historical practice of farmers to save seed for their own use, with occasional minor transactions with neighbors on this saved seed. The statute does not authorize the farmer to go into the commercial seed business with half of each crop of certified variety. Instead of resolving an ungainly statute in a way so facially contrary to its purpose, at a minimum the court should rehear the case, with adequate participation from the *amici* and with full briefing of these issues.

# APPENDIX D

## THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

---

No. 92-1048

ASGROW SEED COMPANY,  
*Plaintiff-Appellee,*  
v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEE'S,  
*Defendants-Appellants.*

---

### ORDER

Based on the papers submitted by Asgrow Seed Company, and any response thereto, it is **HEREBY ORDERED** that Asgrow's motion for a stay of this court's mandate pending Asgrow's filing of a writ of certiorari to the United States Supreme Court, and the final disposition by the Supreme Court of the issues raised by that writ, is **GRANTED**.

Date: 4/12/93

/s/ Francis X. Gindhart, Clerk  
For the Court

## APPENDIX E

## STATUTES INVOLVED

**7 U.S.C. § 2541. Infringement of plant variety protection**

Except as otherwise provided in this subchapter, it shall be an infringement of the rights of the owner of a novel variety to perform without authority, any of the following acts in the United States, or in commerce which can be regulated by Congress or affecting such commerce, prior to expiration of the right to plant variety protection but after either the issue of the certificate or the distribution of a novel plant variety with the notice under section 2567 of this title:

- (1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or possession of it;
- (2) import the novel variety into, or export it from, the United States;
- (3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or
- (4) use the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom; or
- (5) use seed which had been marked "Unauthorized Propagation Prohibited" or "Unauthorized Seed Multiplication Prohibited" or progeny thereof to propagate the novel variety; or
- (6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received; or
- (7) perform any of the foregoing acts even in instances in which the novel variety is multiplied other than sexually, except in pursuance of a valid United States plant patent; or

- (8) instigate or actively induce performance of any of the foregoing acts.

**7 U.S.C. § 2543. Right to save seed; crop exemption**

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.



JUL 26 1993

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

ASGROW SEED COMPANY,

*Petitioner,*

v.

DENNY WINTERBOER and BECKY WINTERBOER,

d/b/a DEEBEES,

*Respondents.*

Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

**BRIEF OF RESPONDENTS IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

WILLIAM H. BODE

*Counsel of Record*

LUIS M. ACOSTA

CAROL A. TERRY

WILLIAM H. BODE & ASSOCIATES

1150 Connecticut Avenue, N.W.

Ninth Floor

Washington, D.C. 20036

(202) 828-4100

Counsel for Denny Winterboer  
and Becky Winterboer

BEST AVAILABLE COPY

## QUESTION PRESENTED FOR REVIEW

Whether a unanimous Federal Circuit panel erred in declining petitioner's invitation to reinterpret the "farmer's exemption" to the Plant Variety Protection Act, which permits farmers to sell otherwise protected seed to other farmers for reproductive purposes, as limited to 1/45th of a farmer's soybean crop, thereby effectively emasculating the exemption.\*

---

\* Asgrow presents as a separate question for review whether sales under the farmer's exemption remain subject to the notice requirement of section 2541(6). Whether the Federal Circuit's correct ruling on this issue should be reviewed by this Court requires no more than a cursory reading of section 2543, which is unambiguous on this point.



## TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	9
I. THE FEDERAL CIRCUIT CORRECTLY INTERPRETED THE FARMER'S EXEMPTION TO THE PVPA.....	7
II. NO CONFLICT AMONG THE CIRCUITS EXISTS.....	16
III. THIS POLITICAL DISPUTE SHOULD BE LEFT TO CONGRESS.....	18
IV. ASGROW'S PREDICTIONS OF DIRE CONSEQUENCES RESULTING FROM THE FEDERAL CIRCUIT'S DECISION ARE LAWYERS' HYPERBOLE.....	20
CONCLUSION.....	24

## TABLE OF AUTHORITIES

### CASES

<u>Delta &amp; Pine Land Co. v. Peoples Gin Co.</u> , 694 F.2d 1012 (5th Cir. 1983) .....	17
<u>Mertens v. Hewitt Associates</u> , 61 U.S.L.W. 4510 (U.S. June 1, 1993).....	13
<u>Pavelic &amp; LeFlore v. Marvel Entertainment Group</u> , 493 U.S. 120 (1989).....	24
<u>Rodriguez v. United States</u> , 480 U.S. 522 (1987).....	14
<u>United States v. Rutherford</u> , 442 U.S. 544 (1979).....	24

### STATUTES

7 U.S.C. §§ 2321-2581.....	1
7 U.S.C. § 2541(3).....	16
7 U.S.C. § 2541(6).....	i
7 U.S.C. § 2543.....	<u>passim</u>
28 U.S.C. § 1295(a)(1).....	17

## TABLE OF AUTHORITIES -- Continued

### MISCELLANEOUS

U.S. Department of Agriculture, Agricultural Economic Report Number 654, <u>Intellectual Property Rights and the Private Seed Industry</u> (1991).....	15
Dan Kirkpatrick, Communications Specialist, Asgrow Seed Company, <u>Enforcing the Letter of the Law,</u> Seed World, Dec. 1991.....	3
Letter from S.F. Rollin, Commissioner, Plant Variety Protection Office, to Dr. W.R. Fehr, Iowa State University (April 19, 1973).....	15
Memorandum from Kenneth H. Evans, Commissioner, Plant Variety Protection Office, to Paul Fuller, Director, Livestock and Seed Division, Department of Agriculture (October 18-24, 1987).....	15
<u>PVP Rights Should be Enforced</u> , Seed Industry, Aug./Sept. 1991.....	3

### STATEMENT OF THE CASE

The centuries-old right of farmers to sell seed grown on their farms to other farmers is preserved in the Plant Variety Protection Act, 7 U.S.C. §§ 2321-2581 ("PVPA"). Shortly after the PVPA's promulgation in 1970, the United States Department of Agriculture ("USDA") affirmed, and the farming industry accepted, the right of farmers to sell otherwise protected seed to other farmers for reproductive purposes, which practice is sometimes referred to as "brown bagging."<sup>1</sup> Despite the preservation of the farmer's right to sell protected seed to other farmers in the PVPA (and to plant such saved seed on their own farms), the seed industry has flourished under the PVPA. Many new firms have entered the

---

<sup>1</sup> Except where noted, record cites to items discussed in this Statement of the Case are provided under the heading "Argument," *infra*.



market. Like other seed companies, Asgrow's profits have steadily increased.

In spite of its success, the seed industry in general, and Asgrow, in particular, in recent years have attempted to turn the PVPA into a virtual seed monopoly. The motivation behind this effort is clear: its own seeds and seed licenses obtained by assignments from state universities and government-funded research laboratories, such as the varieties at issue in this suit, would be much more valuable. Indeed, in countries in Europe where farmers have lost the right to sell protected varieties to other farmers, and even to replant on their own farms, the price of seed is substantially higher than in the United States.

First, the American Seed Trade Association, of which Asgrow is a member, pressed USDA's Plant Variety Protection Office for an interpretation severely

limiting the right of farmers to sell to other farmers. USDA refused to issue such an interpretation. Thereafter, Asgrow began an extensive course of litigation against "brown baggers." Indeed, through the trade press, Asgrow's in-house counsel offered litigation services to other seed companies and explained how suits could cause "headaches" for farmers exercising their rights under the PVPA.<sup>2</sup> Faced with the high costs of litigation compared with the meager profits from brown-bagging, most defendants readily agreed to stop this activity, even though they had the right to continue. Becky and Denny Winterboer decided to stand and fight.

---

<sup>2</sup> Dan Kirkpatrick, Communications Specialist, Asgrow Seed Company, Enforcing the Letter of the Law, Seed World, Dec. 1991, filed with the Federal Circuit in the Addendum to Brief of Appellants at SA47-48; PVP Rights Should be Enforced, Seed Industry, Aug./Sept. 1991, Addendum to Brief of Appellants at SA49-50.

The various interpretations of the PVPA's farmer's exemption pressed by Asgrow and the amici in this case torture the plain language of the statute and share one overarching defect -- each would vitiate the exemption. Whether it is necessary to destroy the exemption to save the PVPA, as Asgrow maintains, is a question for the United States Congress, not this Court. Congress can consider the policy issues implicated by granting seed companies further patent-like protection, including the serious concerns about the ensuing elimination of genetic biodiversity in this nation's seed crops, and the economic effects of granting complete monopolies on seed varieties to seed companies. This Court rightfully should decline to reinterpret the PVPA based on petitioner's overly focused policy reasons and deny certiorari.

#### SUMMARY OF ARGUMENT

This case is not worthy of the exceptional exercise of this Court's certiorari jurisdiction. A unanimous panel of the Court of Appeals for the Federal Circuit correctly ruled that the farmer's exemption to the infringement provisions of the PVPA nowhere delimits the right of a farmer to sell seed to other farmers to only 1/45th of the selling farmer's soybean crop. Indeed, such an interpretation would vitiate the farmer's exemption. The opinion is mandated by the plain meaning of the statute and is consistent with the traditional and historical right of farmers to sell seed produced on their farm to other farmers, which right predates the PVPA and was incorporated into it in the form of the farmer's exemption.



Because the Federal Circuit has exclusive jurisdiction over issues arising under the PVPA, there can be no conflict among the lower courts over the statute's interpretation. To the extent the seed industry wants the farmer's exemption to the PVPA to be rewritten to favor seed companies over the interests of farmers, Congress, and not this Court, is the proper forum for this political dispute. Indeed, Congress is presently considering amending the PVPA to eliminate the farmer's exemption.

Nor is this case of sufficient consequence to warrant grant of the writ. Petitioner's scenario of the decline of American agriculture as a result of this decision conflicts with the facts. Even though the industry has long accepted the interpretation reaffirmed by the Federal Circuit's opinion, a large number of new seed companies have entered the market and

existing firms, such as Asgrow, have posted impressive and continually growing profits. In any event, this Court is not the proper forum in which to address this policy issue.

#### ARGUMENT

##### I. THE FEDERAL CIRCUIT CORRECTLY INTERPRETED THE FARMER'S EXEMPTION TO THE PVPA

The farmer's exemption to the infringement provisions of the PVPA is straightforward. It provides:

it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes . . . .

7 U.S.C. § 2543. The Federal Circuit's decision interpreting this provision correctly allows a farmer to sell saved seed for reproductive purposes as long as

the farmer uses a larger amount of his or her crop for nonreproductive purposes.

Asgrow seeks to limit drastically the farmer's right to sell seed to the amount necessary for planting the farmer's ensuing crop the following year -- to 1/45th of his or her crop. Asgrow's "ensuing crop limitation" argument requires elaborate and unnatural approaches to statutory interpretation that compare unfavorably with the Federal Circuit's common sense reasoning.

The difficulty of Asgrow's "ensuing crop limitation" argument is evidenced by the fact that three separate interpretations of section 2543 have been used in this case to justify it, none of which are well-grounded. The first is found in the district court's decision, where section 2543 is edited to imply that the phrase "for seeding purposes" modifies the term "save seed":

The language of the statute is that, "it shall not infringe any right hereunder for a person to save seed produced by him . . . for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section . . . ."

Petitioner's App. B at 21a (emphasis in original). The district court ruled, without explanation, that a farmer may save only that amount necessary to plant his or her crop for the subsequent crop year, and therefore may not sell more than that amount. *Id.* at 21a-22a.

The second interpretation justifying the ensuing crop limitation is set forth in Asgrow's brief before the Federal Circuit. Recognizing the implausibility of the district court's decision, Asgrow introduced a new interpretation. It maintained that section 2543 should be broken into two parts, an on-farm seed use exemption and an off-farm seed use



exemption. Asgrow argued that the on-farm exemption applies where the farmer either uses the crop produced from the saved seed on his farm or sells it for non-reproductive use, while the off-farm exemption applies where the farmer qualifies because of his or her primary farming occupation, the sale is made to another farmer for reproductive purposes, the sale complies with state law, and the sale is made from "saved seed." Asgrow asserted that the term "saved seed" must have the same meaning in both parts of section 2543, and therefore the farmer may sell no more than the amount the farmer might be able to use in planting next year's crop.

Now, before this Court, Asgrow presses yet a third interpretation! The interpretation adopted in Asgrow's petition was first included in an amicus brief before the Federal Circuit by Jacob

Hartz Seed Company, and was later used in Asgrow's petition for rehearing in banc.<sup>3</sup> Under its most recent interpretation, Asgrow asserts that because the opening phrase of section 2543 provides that the rest of the first sentence does not apply if the action in question constitutes sexually multiplying a novel variety as a step in marketing the variety, it is a violation of the statute to sell seed unless it was saved only for future use as seed on the farmer's own farm. Petition at 14-20.

The existence of three separate versions of statutory interpretation to justify Asgrow's ensuing crop limitation theory demonstrates the desperation of Asgrow's efforts to turn a farmer's soybean into a pearl for the seed

---

<sup>3</sup> Asgrow acknowledges that its current analysis differs from that in its initial brief before the Federal Circuit. Petition at 10.

industry. All of the interpretations offer a fundamentally unnatural and strained reading of the statute. If Congress intended to eliminate the traditional right of farmers to sell seed to other farmers for reproductive purposes, it easily could have done so. Congress in fact had no such intention, and Asgrow's ensuing crop limitation is a preposterous interpretation of the statute.

Moreover, the third version of the ensuing crop limitation must fail, as do the two discarded interpretations, because of a fundamental logical problem: the amount of seed necessary to plant a farmer's ensuing crop is much less than the amount necessary to ensure that the person's "primary" occupation is the growing of crops for sale for other than reproductive purposes. In the case of soybeans, the amount needed for replanting

the next year's crop is 1/45th of the farmer's harvest. Asgrow's ensuing crop limitation theory therefore would render superfluous the "primary farming occupation" language in section 2543, contrary to basic canons of statutory construction.

Throughout its brief, Asgrow insists that the Federal Circuit's reading of the farmer's exemption is contrary to the primary purpose of the PVPA. Petition at 11-13, 23-24 & 28-29. However, "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." Mertens v. Hewitt Associates, 61 U.S.L.W. 4510, 4514 (U.S. June 1, 1993) (emphasis in original). Contrary to Asgrow's position, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the



statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 526 (1987) (emphasis in original).

Farmers have always had a right sell "brown bagged" seed. The PVPA, which was a political compromise between farm interests and the seed industry, preserved this right, with certain specified limitations identified by the Federal Circuit. Constructions of the PVPA by the agencies charged with administering the statute have recognized this right. In 1973, the Commissioner of the Plant Variety Protection Office stated, "[t]here is no limitation as to the amount of sales permitted a grower under Section 113 of the Act [7 U.S.C. § 2543] except to the extent it may affect his 'primary farming occupation' classification upon which the

exemption is based."<sup>4</sup> Later, after the seed industry urged the Plant Variety Protection Office to issue a regulation that would narrowly define the farmer's exemption, it declined to do so.<sup>5</sup> Likewise, a Department of Agriculture report stated with respect to the exemption that if a farmer's primary occupation is the growing of crops, "49 percent of a harvest can be sold as seed."<sup>6</sup> These agency determinations are entitled to deference.

---

<sup>4</sup> Letter from S.F. Rollin, Commissioner, Plant Variety Protection Office, to Dr. W.R. Fehr, Iowa State University (April 19, 1973), Addendum to Brief of Appellants at SA35-36.

<sup>5</sup> Memorandum from Kenneth H. Evans, Commissioner, Plant Variety Protection Office, to Paul Fuller, Director, Livestock and Seed Division, Department of Agriculture (October 18-24, 1987), Addendum to Brief of Appellants at SA34.

<sup>6</sup> U.S. Department of Agriculture, Agricultural Economic Report Number 654, Intellectual Property Rights and the Private Seed Industry 4 (1991), Addendum to Brief of Appellants at SA40-42.

Asgrow's proffered interpretation seeks to upset the balance struck by Congress between the interests of farmers and the seed industry in passing the PVPA, which balance was correctly recognized by the Federal Circuit. This Court's limited certiorari review should not be spent to upset this balance.<sup>7</sup>

## II. NO CONFLICT AMONG THE CIRCUITS EXISTS

Asgrow labors to create a conflict between the Courts of Appeals for the Federal Circuit and the Fifth Circuit in an effort to bolster its argument in favor of the writ of certiorari. Petition at 27-28. This effort must fail. First, there is no conflict between the instant

---

<sup>7</sup> Asgrow also contends that a relationship between sections 2541(3) and 2543 requires that simple selling efforts be held as the equivalent of marketing. Petition at 14-16. The Federal Circuit, however, was correct in finding that a qualifying farmer may make limited sales of seed under the farmer's exemption without engaging in the broader activity of marketing proscribed under section 2541(3). Petition, App. A at 12a-13a.

case and the Fifth Circuit's decision in Delta & Pine Land Co. v. Peoples Gin Co., 694 F.2d 1012 (5th Cir. 1983), which merely held that the farmer's exemption applies only to farmers and not third parties.<sup>8</sup> In any event, because the Federal Circuit, pursuant to 28 U.S.C. § 1295(a)(1), now possesses exclusive jurisdiction over matters arising under the PVPA, any alleged conflict between it and any other circuit on a PVPA issue must be resolved in favor of the Federal Circuit's position. There is no live conflict among the circuits that this Court needs to resolve. Asgrow's attempt to manufacture such a conflict is unavailing.

---

<sup>8</sup> Furthermore, the amount of sales of saved seed involved in Delta and Pine Land obviously was in excess of the amount necessary to plant the farmer's ensuing crop, yet the ensuing crop limitation was not addressed in that case. See 694 F.2d at 1014.

### III. THIS POLITICAL DISPUTE SHOULD BE LEFT TO CONGRESS

Asgrow's real purpose throughout this litigation has been to modify the legislative compromise embodied in the PVPA between the interests of farmers and the interests of the seed industry. While the PVPA protects developers of new seeds, it also preserves, with certain limitations, the historical right of farmers to sell seeds grown on their farm to other farmers for reproductive purposes. The Federal Circuit's decision correctly delineated the contours of the political compromise embodied in the statute.

To the extent the present Congress believes the balance of interests between the seed industry and farmers embodied in the PVPA should be modified, however, it is empowered to alter the statute. In fact, now pending before the Senate is

consideration of an international treaty, the 1991 Union for the Protection of New Varieties of Plants ("UPOV") Convention, which the United States has signed and which awaits Senate ratification. Ratification of this treaty will require amendments to the PVPA, including the possible elimination of the farmer's exemption. In conjunction with the pending ratification, members of Congress currently are planning to introduce bills to amend the PVPA. For example, Senator Robert Kerrey of Nebraska has drafted legislation that would rescind the farmer's exemption.<sup>9</sup> Section 9 of Senator Kerrey's bill would delete the farmer's exemption by amending the first sentence

---

<sup>9</sup> As of the date of the filing of this brief in opposition, the bill had been drafted, and Senator Kerrey was planning to introduce it within coming weeks. Hearings on the bill are scheduled for September 20, 1993. Telephone interview with Marsha Stanton, Office of Senator Kerrey (July 21, 1993).



of section 2543 by striking all that follows the portion of the sentence beginning with "Provided, That . . . ."

In light of the fact that the very language at issue in the Federal Circuit's decision may soon be deleted from the United States Code, it would be an imprudent use of this Court's limited certiorari jurisdiction to hear this case.

IV. ASGROW'S PREDICTIONS OF DIRE CONSEQUENCES RESULTING FROM THE FEDERAL CIRCUIT'S DECISION ARE LAWYERS' HYPERBOLE

Asgrow attempts to portray the Federal Circuit's refusal to vitiate the farmer's exemption to the PVPA as devastating to the seed industry, American agriculture, and the nation's economy as a whole. Petition at 24-26. Asgrow's presentation of the impact of farmer's sales of brown bagged seed on agriculture

and the economy does not square with the facts.

Farmers have always had the right to sell seed grown on their farms. The enactment of the PVPA in 1970 was the first statute to limit this right in any way. Since enactment of the PVPA, which was widely understood to include the farmer's right to sell saved seed under the "primary farming occupation" limitation, research and development by seed companies has proceeded apace. Seed companies have operated quite profitably under the PVPA, and the number of private soybean breeders has increased almost eightfold since the statute's enactment.<sup>10</sup> Significant genetic seed research is also

---

<sup>10</sup> Information on seed company profits in recent years, including those of Asgrow's parent, The Upjohn Company, and increases in the number of breeders, was filed below in the Addendum to Brief of Appellants at SA65-70. The evidence shows that the seed business has been very profitable and does not face extinction as the result of brown bagging by small farmers.

conducted by state universities and government facilities, supported by federal tax dollars and mandatory contributions by farmers like the Winterboers. The "parent" seeds developed using public funds are frequently cross-bred by commercial seed companies to create new varieties, which are then certified by the Plant Variety Protection Office and sold by these companies on the retail market for profit.<sup>11</sup> Even though brown bagged seed is less expensive than certified varieties, most farmers nevertheless choose to purchase certified varieties for each annual planting because they are perceived to be superior to second generation seed.

---

<sup>11</sup> Such was the case with the varieties at issue in this litigation. See attachments to letter from William H. Bode, Counsel to the Winterboers, to the Honorable Alan D. Lourie, et al. (May 7, 1992).

Further evidence that Asgrow overstates the impact of this case in its petition is the fact that, while publicly traded companies are required to file statements with the Securities and Exchange Commission concerning matters that could impact the value of shareholders' stock, Asgrow's parent, The Upjohn Company, did not even deign to mention the Asgrow v. Winterboer litigation in its 10-K filings! If Asgrow's dire predictions had any substance, Upjohn would be expected to report this to the Commission.

American agriculture was the envy of the world prior to the PVPA's enactment, and has remained so since, despite the continued practice of selling brown bagged seed under the "primary farming occupation" exception. Asgrow's suggestion that the Federal Circuit's decision will destroy American agriculture

is mere lawyers' hyperbole. Moreover, there are other issues with broad ramifications implicated in this controversy, including the need to encourage genetic biodiversity in our seed crop. Congress, and not this Court, is the proper forum for resolving these important policy issues.<sup>12</sup>

#### CONCLUSION

For the foregoing reasons, respondents respectfully submit that Asgrow's petition for a writ of certiorari should be denied.

---

<sup>12</sup> United States v. Rutherford, 442 U.S. 544, 555 (1979) ("federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with . . . prudent public policy"); Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

Respectfully submitted,

WILLIAM H. BODE  
Counsel of Record  
LUIS M. ACOSTA  
CAROL A. TERRY

WILLIAM H. BODE & ASSOCIATES  
1150 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036  
(202) 828-4100

Counsel for Denny Winterboer  
and Becky Winterboer

July 26, 1993



6  
No. 92-2038

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

---

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

---

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

---

**PETITIONER'S REPLY BRIEF**

---

*Of Counsel:*

BRUCE STEIN  
ROBERT A. ARMITAGE  
SIDNEY B. WILLIAMS, JR.  
THE UPJOHN COMPANY  
7000 Portage Road  
Kalamazoo, Michigan 49001  
(616) 323-4000  
LAWRENCE C. MAXWELL  
TRABUE, STURDIVANT &  
DEWITT

RICHARD L. STANLEY  
*Counsel of Record*  
JOHN F. LYNCH  
ARNOLD, WHITE & DURKEE  
750 Bering Drive  
Suite 400  
Houston, Texas 77057  
(713) 787-1400  
*Counsel for Petitioner*  
*Asgrow Seed Company*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
I. THE RESPONDENTS AND THE FEDERAL CIRCUIT HAVE FAILED TO GIVE MEAN- ING TO ALL OF THE STATUTORY LAN- GUAGE .....	1
II. CONGRESS ONLY ALLOWED THE SALE OF PVPA-PROTECTED SEED THAT WOULD BE SAVED FOR PLANTING ON THE FARMER'S OWN FARM .....	4
III. THE UNITED STATES DEPARTMENT OF AGRICULTURE AND THE PLANT VARIETY PROTECTION OFFICE HAVE NO AUTHOR- ITY TO INTERPRET SECTION 2543 .....	5
IV. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS DID NOT ADOPT OR CONSIDER THE FEDERAL CIRCUIT'S IN- TERPRETATION OF SECTION 2543 .....	7
V. CERTIORARI SHOULD NOT BE DENIED NOW BECAUSE CONGRESS MIGHT ENACT ADDITIONAL PVPA LEGISLATION LATER..	9
VI. THE NOTICE REQUIREMENT OF SECTION 2541(6) MUST APPLY TO ALL SALES OF SEED MADE IN ACCORDANCE WITH SEC- TION 2543 .....	10

## TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>Asgrow Seed Co. v. Kunkle Seed Co.</i> , No. 86-3138-A (W.D. La. 1987), <i>aff'd</i> , 845 F.2d 1034 (Fed. Cir. 1988) .....	7
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281 (1979) .....	6
<i>Federal Election Commission v. Democratic Senatorial Campaign Committee</i> , 454 U.S. 27 (1981) .....	7
<i>Griffin v. Oceanic Contractors, Inc.</i> , 458 U.S. 564 (1982) .....	4
<i>Horner v. Jeffrey</i> , 823 F.2d 1521 (Fed. Cir. 1987) ..	7
<i>United States v. Acosta De Evans</i> , 531 F.2d 428 (9th Cir.), <i>cert. denied</i> , 429 U.S. 836 (1976) ....	9
 <i>Statutes</i>	
7 U.S.C. § 2326 .....	5
7 U.S.C. § 2541 (1) .....	10
7 U.S.C. § 2541 (3) .....	2, 8, 10
7 U.S.C. § 2451 (4) .....	8
7 U.S.C. § 2541 (6) .....	10
7 U.S.C. § 2543 .....	<i>passim</i>
7 U.S.C. § 2561 .....	5
28 U.S.C. § 1338 (a) .....	6
35 U.S.C. § 6 .....	5

## PETITIONER'S REPLY BRIEF

Asgrow submits this reply brief to address the arguments raised in the Winterboers' opposition to Asgrow's petition and to demonstrate why each is based on mischaracterizations of the statute and the record, and is therefore flawed as a matter of law and logic.

# I. THE RESPONDENTS AND THE FEDERAL CIRCUIT HAVE FAILED TO GIVE MEANING TO ALL OF THE STATUTORY LANGUAGE

The first paragraph of the Winterboers' argument in opposition highlights the crucial legal error that permeates their entire statutory analysis. Simply put, the Winterboers refuse to start their analysis at the beginning of the statute. *See* Brief in Opp., at 7. By declining to even acknowledge, much less analyze, the initial exception from the scope of 7 U.S.C. § 2543 for such action that "may constitute an infringement under subsections (3) and (4) of section 2541," the Winterboers are not able to provide a coherent interpretation that gives meaning to all of the words chosen by Congress.

It is the very portion of section 2543 that has been conspicuously omitted from the Winterboers' brief that contains the quantitative limitation on the right to save seed provided by Congress in the statute as written and enacted. *See* Pet. 13-18. While the Court of Appeals did manage to recite all the words in the statute, its analysis still suffers from the same fundamental legal error—a failure to give meaning to all the words of the statute.

While urging that Asgrow's petition be denied, the Winterboers offer no analysis to support the Federal Circuit's interpretation. Indeed, they have not even tried to trace the twists and leaps in the Federal Circuit's reasoning. Unable to explain the Court of Appeals' insupportable result, the Winterboers instead decry Asgrow's petition as requiring "elaborate and unnatural approaches to statutory interpretation that compares unfavorably with



the Federal Circuit's common sense reasoning." Brief in Opp., at 8.

Starting at the beginning and giving meaning to each word and phrase used by Congress is scarcely an "unnatural" approach to statutory interpretation. Moreover, Asgrow's "elaborate" analysis of section 2543 is faithful to the statutory phrasing used by Congress. The fact that the Winterboers omitted key statutory language while describing the Federal Circuit's interpretation of section 2543 as "common sense reasoning" is a telling admission that the Court of Appeals' analysis is completely divorced from the statutory language.

According to the Winterboers, Asgrow's statutory interpretation "would render superfluous the 'primary farming occupation' language in section 2543, contrary to the basic canons of statutory construction." Brief in Opp., at 13. As correctly recognized by Judge Newman, however, the "primary farming occupation" language only identifies who is able to sell *any* seed under section 2543, it does not limit or quantify the amount of seed that can be permissibly sold by a qualified person. Pet. App. 36a.

Moreover, if the "primary farming occupation" clause is the only quantitative restriction on the amount of protected seed that a farmer can sell, as the Winterboers urge, then much of section 2543 is indeed superfluous. Under the Winterboers' analysis, the introductory clause is never considered, and the second reference to section 2541(3) in the proviso is ignored. Similarly, under the Federal Circuit's construction, the introductory clause of section 2543 has been misinterpreted, and the second reference to section 2541(3) rendered redundant. Pet. App. 6a, 12a. In either case, it is apparent that the basic canons of statutory construction were violated by the Court of Appeals and by the Winterboers, not by Asgrow.<sup>1</sup>

<sup>1</sup> The Winterboers' arguments are the very paradigm of bootstrapping. They start from the very premise sought to be preserved

Under the facts of this case, the legal issue before the Court is whether Congress intended that a soybean farmer be able to produce forty-five times the amount of PVPA-protected soybean seed that was obtained from the PVPA-certificate owner (or its representative), and then sell *over twenty-two times* what he purchased in competition with the owner of the variety. If the Federal Circuit's view is correct, a single farmer that purchases 1000 bushels of Asgrow soybean seed is able to sell 22,500 bushels (*i.e.*, half) of the resulting crop as seed to other farmers, the purchasing farmers could then produce 1,012,500 bushels of the same Asgrow PVPA-protected soybeans. If half of each of those crops was then sold as seed to other farmers, 22,781,250 bushels of Asgrow soybeans would be produced, of which half could again be sold as seed. Within three years, therefore, Asgrow could be competing in the market for its own seed with up to 11,390,625 bushels of seed that descended from the initial 1000 bushels that were sold to the first farmer. *See also* Pet. App. 32a n.2 (same analysis for one bushel).

No private company can or will continue to devote the large amounts of capital, land, and resources needed to develop novel plant varieties in the face of the Federal Circuit's currently controlling interpretations of section 2543. No statutory scheme of intellectual property protection, particularly one covering a commodity that reproduces itself many times over, could have been designed by Congress with such an immense loophole from infringement. If the literal import of the language used by Congress in section 2543 was that up to half of a farmer's crop in a protected plant variety could be sold to others for use as seed, this case would represent one of those

—that the proper interpretation of section 2543 is that up to half of a farmer's crop of a protected novel variety can itself be sold as seed—and then attempt to justify that result by asserting that Asgrow's interpretation would vitiate that assumed exemption. However, interpreting the language of the so-called "farmer's exemption" so that it has the meaning intended by Congress does not vitiate the true exemption provided in section 2543.

rare cases where a court should be compelled to interpret the statute in a manner that avoided the absurd consequences. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

Contrary to the Winterboers' accusations, however, Asgrow is not attempting to have this Court subvert the statutory language by following a vague policy as a substitute for the clear language of the statute. *See* Pet. 12. The legal error in this case stems from the refusal or inability of the Court of Appeals to effectuate Congress' legislative choices by giving meaning to each word used by Congress in the statute. That failure has yielded an interpretation of section 2543 wholly at odds with the statutory language, the purpose for the Act, and Congressional intent.

## **II. CONGRESS ONLY ALLOWED THE SALE OF PVPA-PROTECTED SEED THAT WOULD BE SAVED FOR PLANTING ON THE FARMER'S OWN FARM**

Attempting to cloak themselves in "centuries-old" rights that predate the PVPA, the Winterboers claim that "[f]armers have always had a right to sell 'brown bagged' seed." Brief in Opp., at 1, 14. The Winterboers further claim that "[i]f Congress intended to eliminate the traditional right of farmers to sell seed to other farmers for reproductive purposes, it easily could have done so." Brief in Opp., at 12. However, such assertions mischaracterize what is at issue in this case.<sup>2</sup>

What the PVPA recognized in the "right to save seed" provision of section 2543 was the pragmatic practice of farmers saving enough seed from their crop to replant their own farms. *See* Pet. App. 32a. What Congress al-

<sup>2</sup> Even the Winterboers concede that Congress restricted the right of persons to sell seed produced on their farms when such seed is protected by a duly-issued PVPA certificate. Brief in Opp., at 21 ("The enactment of the PVPA was the first statute to limit this right in any way.").

lowed in the section was the sale of "such saved seed" to other farmers when the farmer that saved the seed later had a change of plans and no longer needed that seed for his own use in planting. Under that provision, no portion of the farmer's crop would be wasted but no incentive would be created to cause the farmer to save more seed than would be needed on his own farm. Congress never intended to preserve a farmer's ability to sell seed in commercial quantities, or to provide a vehicle by which traditional farmers would be tempted to become seed dealers in protected varieties.

## **III. THE UNITED STATES DEPARTMENT OF AGRICULTURE AND THE PLANT VARIETY PROTECTION OFFICE HAVE NO AUTHORITY TO INTERPRET SECTION 2543**

The Winterboers suggest that this Court should defer to prior interpretations of section 2543 made by the agencies charged with administering the PVPA. Brief in Opp., at 14. However, Congress only delegated authority for the Secretary of Agriculture to "establish regulations, not inconsistent with law, for the conduct of proceedings in the Plant Variety Protection Office after consultation with the Plant Variety Protection Board." 7 U.S.C. § 2326.

Neither the United States Department of Agriculture ("USDA") nor the Plant Variety Protection Office ("PVP Office") were given any authority by Congress to interpret the PVPA's infringement provisions.<sup>3</sup> For that matter, neither the USDA nor the PVP Office has developed any infringement expertise because such jurisdiction lies exclusively with the district courts. *See* 7 U.S.C. § 2561 ("owner shall have remedy by civil action for infringement"); 28

<sup>3</sup> The PVPA is like the patent and trademark laws in these respects. The United States Patent and Trademark Office ("PTO"), by the Commissioner of Patents, has statutory authority to grant and issue patents and register trademarks that meet the statutory requirements. However, the PTO has no jurisdiction or rulemaking authority over issues or actions involving the infringement of patents or trademarks. *See* 35 U.S.C. § 6.



U.S.C. § 1338(a) ("district courts shall have original jurisdiction over any civil action arising under any Act of Congress relating to [plant variety protection]"). Even so, the Winterboers rely upon three isolated documents<sup>4</sup> in an attempt to show a prior administrative interpretation consistent with the Federal Circuit's later and erroneous construction of section 2543. See Brief in Opp., at 14-15 & nn.4-6.

The document cited at Brief in Opp. 15 & n.5 is an "activity report" for the week of October 18-24, 1987, apparently written by the Commissioner of the PVP Office. The report states that "[t]he PVP Office received an interpretation from . . . the Office of General Counsel that the [PVPA] does not give the Department of Agriculture sufficient authority to amend the Regulations to further define what is exempted under section 113 of the PVPA." Thus, the cited report actually confirms that the views of the PVP Office or its commissioners as to the meaning of section 2543 are not entitled to any deference from this Court.

For that reason, even if the cited 1973 letter by a different Commissioner (Brief in Opp., at 14-15 & n.4) is considered equivalent to an agency regulation, it would be at most merely interpretive. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-04 (1979) (for an agency regulation to have the force of law, it must prescribe substantive or legislative rules rather than merely interpretive rules). In any event, an interpretive regulation issued without any legislative delegation of authority that is contrary to the plain meaning of the statute that the regulation purports to interpret, as well as to the statute's

<sup>4</sup> The documents relied upon by the Winterboers in their opposition were not in the record before the district court but were first supplied in an addendum to the Winterboers' brief at the Court of Appeals. Although the Court of Appeals' denied Asgrow's motion to strike the Winterboers' addendum, Pet. App. 14a, the Federal Circuit did not cite or rely upon any of the cited documents.

legislative history and purpose, cannot be sustained.<sup>5</sup> See *Horner v. Jeffrey*, 823 F.2d 1521, 1530 (Fed. Cir. 1987).

#### IV. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS DID NOT ADOPT OR CONSIDER THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 2543

The Winterboers have attempted to shield the Federal Circuit's seriously flawed construction of the first sentence of 7 U.S.C. § 2543 from review by this Court by miscasting Asgrow's petition as a policy-based plea that must be addressed to Congress. Brief in Opp., at 4. However, Asgrow is not seeking a writ of certiorari from this Court to revise the terms of section 2543; it is only asking this Court to restore the interpretation intended and implemented by Congress. See, e.g., *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) ("courts are the final authorities on issues of statutory construction").

Congress has already addressed the competing concerns of the seed industry, the farmers, and the American consumers when it enacted the PVPA. In so doing, Congress developed a statutory scheme that balanced the interests of each party and allowed each of those parties to benefit from the PVPA. The only persons who do not and should not benefit from the PVPA as written are persons such as the Winterboers that divert their crop from non-reproductive uses in order to take unfair advantage of the successful research accomplished by the plant breeders.<sup>6</sup>

<sup>5</sup> The third document cited by the Winterboers (Brief in Opp., at 15 & n.6) is also irrelevant to show an authorized agency interpretation of section 2543. That USDA report attempts to summarize *Asgrow Seed Co. v. Kunkle Seed Co.*, No. 86-3138-A (W.D. La. 1987), *aff'd*, 845 F.2d 1034 (Fed. Cir. 1988) (table), a preliminary injunction case in which the district court's opinion is unreported and the Federal Circuit's opinion is nonprecedential. The case was later resolved with an injunction against defendant and payment of damages to Asgrow.

<sup>6</sup> The Winterboers attempt to portray themselves as the champions of America's farmers, who are being persecuted for PVPA violations by large seed companies such as Asgrow. Brief in Opp.,



The Winterboers portray Congress as having decided between permitting farmers to sell up to half of their PVPA-protected crop as seed and restricting farmers to selling only that amount of protected seed needed to replant their farms. *E.g.*, Brief in Opp., at 7. However, the only legislative choice made in 1970 by Congress was between prohibiting all sales of PVPA-protected seed by persons other than the owner and allowing those farmers who were not seed dealers to sell only what protected seed had been saved for use in producing another crop on the farmer's farm.

As proposed, the PVPA did not contain a right to sell protected seed at all. *See* Pet. 20-21. Before its enactment, Congress amended the statute to allow certain qualified persons to sell "such saved seed," *i.e.*, that portion of a person's crop that did not constitute an infringement under subsections (3) and (4) of section 2541. *See* Pet. 14-17. Moreover, that right was added without discussion. If that amendment altered the PVPA from allowing no sales of protected seed to allowing up to half of each crop to be sold as seed, as the Winterboers contend, surely some mention or debate over a change of that magnitude would be in the legislative history.

The complete lack of discussion over the addition of the right to sell "such saved seed" confirms that Congress was making a nonsubstantive change that would not undermine the purpose of the PVPA and that would not prevent breeders from recouping their development costs. The inescapable conclusion is that Congress did not strike the "balance" urged by the Winterboers nor did Congress

at 3. While colorful rhetoric, the Winterboers do not represent the typical farmers who benefit from the increased yields and disease-resistant traits of the novel varieties. Instead, the Winterboers are examples of "brown bag" abusers who contribute nothing to science or the industry and who seek a "free ride" on the contributions of plant breeders.

adopt the gross imbalance judicially-created by the Federal Circuit.

#### V. CERTIORARI SHOULD NOT BE DENIED NOW BECAUSE CONGRESS MIGHT ENACT ADDITIONAL PVPA LEGISLATION LATER

The Winterboers also suggest that this Court should not grant Asgrow's petition for a writ of certiorari because "members of Congress are planning to introduce bills to amend the PVPA."<sup>7</sup> Brief in Opp., at 19 & n.9. However, this Court should not avoid statutory interpretation issues of national importance merely because Congress might amend the statute in question in the future, or because individual members of Congress may intend to introduce additional legislation on the subject.

This Court's use of its certiorari jurisdiction where circumstances clearly warrant cannot be thwarted on the basis of predictions of future legislation. The legislative process is time-consuming and uncertain at best. Once introduced, a proposed bill may be revised, rejected, or tabled. Congress faces many other issues of vital importance to the nation, and any proposed revision of the PVPA will be subject to the shifting priorities and limited time of the elected legislature.<sup>8</sup>

The nation cannot afford to wait for Congress to overrule the Federal Circuit's decision misconstruing a statute that was written as Congress intended in the first place. As more seed companies end or curtail novel plant re-

<sup>7</sup> Even if *ex parte* telephone interviews can be added to the record and considered after a petition is filed, the value of yet-to-be-introduced bills when interpreting an existing statute is surely nil. *See United States v. Acosta De Evans*, 531 F.2d 428, 430 n.3 (9th Cir.), *cert. denied*, 429 U.S. 836 (1976).

<sup>8</sup> More importantly, there is no way of predicting when Congress might act on any proposed PVPA legislation, whether it be to conform the PVPA (if necessary) to the requirements of the 1991 Union for the Protection of New Varieties of Plants Convention, or to correct the erroneous interpretation of the existing statute made by the Court of Appeals in this case.

search, the abandonment of projects that has been underway for years will cause an immediate loss to U.S. agriculture. Moreover, those adverse effects will be magnified many times over as future products of discontinued research never reach the marketplace. In light of the huge costs resulting from a delay of only one or two years in reinstating the legislative solution to "brown bag" abuses already provided by Congress in section 2543, this Court should grant Asgrow's requested writ.

**VI. THE NOTICE REQUIREMENT OF SECTION 2541(6) MUST APPLY TO ALL SALES OF SEED MADE IN ACCORDANCE WITH SECTION 2543**

By ignoring the first clause of section 2543, the Winterboers claim the statute provides a complete exemption from all infringement. However, the fact that "it shall not infringe any right" appears in section 2543 does not support the conclusion that seed sold in accordance with section 2543 is no longer subject to the notice requirement of section 2541(6). As explained at Pet. 21-23, section 2543 only operates as a limited exemption to the provisions of subsections (1) and (3) of section 2541. The requirement of giving notice embodied in section 2541(6) simply is not implicated by section 2543.<sup>9</sup>

The Winterboers' assertion (Brief in Opp., at i n.\*) that a "cursory reading" of section 2543 is sufficient to discern the proper meaning of the statute with respect to the continued need to give notice under 7 U.S.C. § 2541(6) aptly summarizes why Asgrow's petition should be granted. If the Court of Appeals' cursory interpretation of section 2543 is left unaltered by this Court, the result will truly be "a travesty of statutory interpretation" (Pet. App. 32a) with immense negative consequences for American agriculture, farmers, and consumers.

<sup>9</sup> See also Amicus Curiae Brief of the Intellectual Property Owners, at 7 (noting that Congress would not have included an imputed notice provision in the last sentence of section 2543 if the express notice provision of section 2541(6) was exempted for those seed sales permitted under section 2543).

Respectfully submitted,

*Of Counsel:*

BRUCE STEIN  
ROBERT A. ARMITAGE  
SIDNEY B. WILLIAMS, JR.  
THE UPJOHN COMPANY  
7000 Portage Road  
Kalamazoo, Michigan 49001  
(616) 323-4000  
LAWRENCE C. MAXWELL  
TRABUE, STURDIVANT &  
DEWITT  
511 Union Street  
Nashville, Tennessee 37219  
(615) 244-9270

RICHARD L. STANLEY  
*Counsel of Record*  
JOHN F. LYNCH  
ARNOLD, WHITE & DURKEE  
750 Bering Drive  
Suite 400  
Houston, Texas 77057  
(713) 787-1400  
*Counsel for Petitioner*  
*Asgrow Seed Company*

(1)  
No. 92-2038

Supreme Court, U.S.

FILED

MAR 18 1994

OFFICE OF THE CLERK

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1993

---

ASGROW SEED COMPANY, PETITIONER

v.

DENNY WINTERBOER AND BECKY WINTERBOER,  
D/B/A DEEBEES

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

---

DREW S. DAYS, III  
*Solicitor General*

FRANK W. HUNGER  
*Assistant Attorney General*

EDWIN S. KNEEDLER  
*Deputy Solicitor General*

RICHARD H. SEAMON  
*Assistant to the Solicitor General*

BARBARA C. BIDDLE

WENDY M. KEATS  
*Attorneys*

*Department of Justice  
Washington, D.C. 20530  
(202) 514-2217*

---

---

24 PM



## QUESTIONS PRESENTED

The Plant Variety Protection Act (PVPA), 7 U.S.C. 2321-2583, generally grants the breeder of a novel variety of a sexually reproduced plant the exclusive right to sell that variety for an 18-year period. That right is enforceable by a civil action for infringement in federal district court. The PVPA exempts from infringement liability, however, certain sales of "saved seed" between farmers. 7 U.S.C. 2543. The questions presented are:

1. Whether the Federal Circuit, which has exclusive jurisdiction over appeals from district court decisions in infringement actions under the PVPA, correctly interpreted the "saved seed" exemption to allow farmers to sell up to half of each crop they produce from a PVPA-protected variety to other farmers for use as seed.

2. Whether a sale of seed pursuant to the "saved seed" exemption must comply with the requirement in 7 U.S.C. 2541(6) that, in order for a sale to be non-infringing, it must be made with notice of the seed's status as a protected variety.

## TABLE OF CONTENTS

	Page
Statement .....	1
Discussion .....	7
Conclusion .....	21

## TABLE OF AUTHORITIES

### Cases:

<i>Conroy v. Aniskoff</i> , 113 S. Ct. 1562 (1993) .....	12
<i>Federal Deposit Insurance Corp. v. Meyer</i> , No. 92-741 (Feb. 23, 1994) .....	9
<i>Gollust v. Mendell</i> , 111 S. Ct. 2173 (1991) .....	20
<i>Keene Corp. v. United States</i> , 113 S. Ct. 2035 (1993) .....	17
<i>Kim Bros. v. Hagler</i> , 167 F. Supp. 665 (S.D. Cal. 1958), aff'd, 276 F.2d 259 (9th Cir. 1960) .....	1

### Treaty and statutes:

International Convention for the Protection of New Varieties of Plants, Mar. 19, 1991 .....	17
Art. 14(1) .....	17
Art. 31 .....	18
Art. 37 .....	18
Plant Patent Act of 1930, ch. 312, 46 Stat. 376, 35 U.S.C. 161-164 .....	2
Plant Variety Protection Act of 1970, 7 U.S.C. 2321 <i>et seq.</i> :	
7 U.S.C. 2321-2583 .....	1
7 U.S.C. 2401 .....	2
7 U.S.C. 2401(a) .....	2
7 U.S.C. 2401(f) .....	1
7 U.S.C. 2402(a) .....	2
7 U.S.C. 2421 .....	2
7 U.S.C. 2481 .....	2
7 U.S.C. 2482 .....	2
7 U.S.C. 2483(a) .....	2, 12
7 U.S.C. 2541 .....	2, 4
7 U.S.C. 2541(1) .....	2, 5

## Statutes—Continued:

	Page
7 U.S.C. 2541(3) .....	<i>passim</i>
7 U.S.C. 2541(4) .....	2, 8
7 U.S.C. 2541(6) .....	2, 5, 7, 20
7 U.S.C. 2543 .....	<i>passim</i>
7 U.S.C. 2561 .....	4
7 U.S.C. 2567 .....	20
7 U.S.C. 2581 .....	12
7 U.S.C. 2583(a) .....	12
28 U.S.C. 1295(a)(1) .....	4, 17
28 U.S.C. 1338 .....	17
28 U.S.C. 1338(a) .....	4

## Miscellaneous:

H.R. 13,631, 91st Cong., 1st Sess. (1969) .....	13
H.R. 2927, 103d Cong., 1st Sess. (1993) .....	17, 19
H.R. Rep. No. 1605, 91st Cong., 2d Sess. (1970) .....	14
S. 1406, 103d Cong., 1st Sess. (1993) .....	17, 18
S. 3070, 91st Cong., 1st Sess. (1969) .....	13
S. Rep. No. 1138, 91st Cong., 2d Sess. (1970) .....	14
<i>The Random House Dictionary of the English Language</i> (2d ed. 1987) .....	9
USDA, Economic Research Service, <i>Agricultural</i> <i>Economic Report</i> No. 654 (1991) .....	16
<i>Webster's Third New International Dictionary of the</i> <i>English Language</i> (1986) .....	9

## In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-2038

ASGROW SEED COMPANY, PETITIONER

v.

DENNY WINTERBOER AND BECKY WINTERBOER,  
D/B/A DEEBEESON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

## STATEMENT

1. a. The Plant Variety Protection Act of 1970 (PVPA or Act), 7 U.S.C. 2321-2583, grants patent-like protection to the breeders of novel varieties of sexually reproduced plants. Sexually reproduced plants are those produced by seed, rather than by asexual methods such as grafting, budding, and cuttings. 7 U.S.C. 2401(f); see *Kim Bros. v. Hagler*, 167 F. Supp. 665, 667 (S.D. Cal. 1958), *aff'd*, 276 F.2d 259 (9th Cir. 1960). They include a number of major agricultural crops in



the United States, such as soybeans, cotton, wheat, barley, oats, and rice.<sup>1</sup>

Under the PVPA, the breeder of a novel variety of a sexually reproduced plant may apply to the Secretary of Agriculture for a certificate of plant variety protection. 7 U.S.C. 2421; see also 7 U.S.C. 2402(a). The application must show that the variety has (1) "[d]istinctness" from existing varieties; (2) "[u]niformity in the sense that any variations are describable, predictable and commercially acceptable"; and (3) "[s]tability," in the sense that the variety, when reproduced, generally "will remain unchanged with regard to its essential and distinctive characteristics." 7 U.S.C. 2401(a). Such applications are ruled upon by the Plant Variety Protection Office (PVPO) established within the Department of Agriculture. 7 U.S.C. 2481, 2482.

A certificate of plant variety protection covers "seed, transplants, and plants" of the novel variety. 7 U.S.C. 2401. It certifies that the owner of the variety has the right, for a period of 18 years:

to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom, to the extent provided by this chapter.

7 U.S.C. 2483(a). A separate section of the Act, 7 U.S.C. 2541, specifies that it infringes an owner's rights to:

(1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or possession of it; [or]

<sup>1</sup> Plants reproduced by asexual methods are afforded patent-like protection under a separate statute, the Plant Patent Act of 1930, ch. 312, 46 Stat. 376, 35 U.S.C. 161-164.

\* \* \* \* \*

(3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or

(4) use the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom; or

\* \* \* \* \*

(6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received.

The provision of the Act primarily at issue in this case, Section 2543, describes certain actions that do not infringe certain of the owner's rights:

#### **Right to save seed; crop exemption**

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced

on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.

An owner whose rights have been infringed may bring a civil action against the infringer. 7 U.S.C. 2561. Jurisdiction over such actions lies exclusively in the federal district courts. 28 U.S.C. 1338(a). Appeals from decisions of the district courts in infringement actions lie exclusively in the Federal Circuit. 28 U.S.C. 1295(a)(1).

b. Respondents Dennis and Becky Winterboer own a farm in Clay County, Iowa. In 1990, they planted 265 acres of soybeans on their farm, using two novel varieties of soybean. Both varieties were covered by certificates of plant variety protection assigned to petitioner Asgrow Seed Company. Pet. App. 4a, 16a, 35a; see also Pet. 4. The planting produced 10,529 bushels of soybeans suitable for seeding purposes, all of which the Winterboers sold to other farmers for use as seed. Pet. App. 4a, 35a; see Pet. 4-5. Such sales of harvested seed by one farmer to another for seeding purposes are known as "brown bag sales."<sup>2</sup>

2. Asgrow brought this infringement action against the Winterboers in the United States District Court for the

<sup>2</sup> Harvested soybeans can be used for reproduction purposes—i.e., as seed—or for consumption purposes, such as for animal feed or human consumption. The PVPA uses several terms to describe the former type of use, including "growing purposes" (7 U.S.C. 2541), "reproductive purposes" (7 U.S.C. 2543), and "seeding purposes" (*ibid.*). There appears to be no difference in the meaning of those terms relevant to this case, and we therefore use the terms interchangeably.

Northern District of Iowa. Asgrow alleged that the Winterboers' brown bag sales of soybeans produced from Asgrow's two novel varieties violated 7 U.S.C. 2541(1), which prohibits the sale of a novel variety; 7 U.S.C. 2541(3), which prohibits the sexual multiplication of a novel variety as a step in marketing it for growing purposes; and 7 U.S.C. 2541(6), which prohibits the dispensing of a novel variety without notice that the variety is protected under the Act. The Winterboers argued that the sales did not violate those provisions because they fell within Section 2543. See Pet. App. 16a-18a.

The district court granted summary judgment in favor of Asgrow, holding that the Winterboers' sales were not exempt from infringement liability under Section 2543. Pet. App. 15a-26a. The court read the first sentence of Section 2543 to "allow[] a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent crop year." Pet. App. 21a. In the court's view, the farmer then could sell the seed that has been saved for replanting purposes (but no more) if the farmer's plans changed, for example, because of a change in market conditions. *Id.* at 22a.

Because the Winterboers "admittedly have sold much more than" was necessary to replant their soybean acreage (Pet. App. 24a), the district court concluded that they had violated 7 U.S.C. 2541(1) and (3).<sup>3</sup> The court permanently enjoined the Winterboers "from selling seed, except for saved seed, to other farmers," Pet. App. 24a, but it deferred ruling on damages, *id.* at 24a-25a.

3. The court of appeals reversed. Pet. App. 1a-14a. It concluded that "[t]he district court erred in \* \* \* read[ing] the crop exemption [in Section 2543] to limit brown bag sales of novel varieties to the maximum amount of seed the selling

<sup>3</sup> The court found it unnecessary to determine whether they also had violated 7 U.S.C. 2541(6). Pet. App. 25a.



farmer would save to plant another crop of like size." Pet. App. 10a.<sup>4</sup>

The court of appeals did, however, discern other limits on the sale of seed under Section 2543. First, the court held that "a farmer who purchases PVPA seed from another farmer cannot save any seed from the crop grown with brown bag seed." Pet. App. 6a. Second, the court noted that "[b]oth the buyer and seller of brown bag seed must be farmers," and that "their primary farming occupation \* \* \* must be to grow crops for sale as food or feed, rather than to grow crops for sale as seed." *Id.* at 7a. In the court's view, the determination of a farmer's "primary farming occupation" must be made "on a crop-by-crop basis." *Id.* at 8a. Under that approach, a farmer may sell up to (but not including) 50% of each crop produced from a PVPA-protected variety to other farmers for seeding purposes, as long as the farmer sells the rest of that crop for consumption purposes. *Ibid.* Third, the court determined that the reference to Section 2541(3) in the opening clause of Section 2543 limits brown bag sales of seed by "clarif[ying] that the crop exemption does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541." Pet. App. 12a. The court believed that, in construing Section 2541(3), "[a]n expansive reading of the term 'marketing' would swallow the entire crop exemption." Pet. App. 12a. The court accordingly held that subsection (3) reaches only one "form of marketing": namely, "extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended mer-

<sup>4</sup> The court of appeals believed that the district court erred in reading the phrase "for seeding purposes" in the first sentence of Section 2543 as modifying the verb "saved." Pet. App. 11a. Instead, the court of appeals determined, the phrase modifies "obtained," and describes the purpose for which seed is obtained from the owner of the variety, not the purpose for which a farmer may save the seed produced from seed obtained from the owner. *Id.* at 11a-12a.

chandising or retail activities." Pet. App. 12a-13a. The court of appeals left it for the district court to decide on remand whether the Winterboers had engaged in that form of marketing. *Id.* at 13a.

Finally, the court of appeals rejected Asgrow's argument that brown bag sales are subject to Section 2541(6), which makes it an infringement to "dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety." The court concluded that "Section 2543 \* \* \* exempts farmers who make limited brown bag sales from this requirement." Pet. App. 13a.

4. The court of appeals denied Asgrow's petition for rehearing and, by a six-to-five vote, rejected its suggestion of rehearing en banc. Pet. App. 28a. In a written statement dissenting from the denial of rehearing en banc, Judge Newman expressed the view that the panel "reached an interpretation of [Section 2543] that is contrary to the statute and its purpose" and that "nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. 30a.

### DISCUSSION

The Federal Circuit erred in holding that 7 U.S.C. 2543 allows a farmer to sell, for seeding purposes, up to 50% of a crop produced from PVPA-protected seed. Properly interpreted, Section 2543 permits a farmer to sell, for seeding purposes, only that portion of the crop that the farmer originally grew for the purpose of planting another crop. Thus, Section 2543 permits the sale of only a fraction of the amount of seed permitted under the Federal Circuit's erroneous interpretation.

The Federal Circuit's error warrants review by this Court. Congress enacted the PVPA to give plant breeders an economic incentive to develop new and improved varieties of seed. The Federal Circuit's interpretation of 7 U.S.C. 2543 thwarts that purpose by allowing farmers to sell massive amounts of novel varieties of seed at a lower price than the developers of



those varieties must charge to take into account the costs and risks of development. Unless corrected, the Federal Circuit's decision is likely to discourage the development of novel varieties of seed, to the detriment of the American public and the competitiveness of American agriculture in world markets.

1. The Federal Circuit misinterpreted Section 2543. That provision permits a farmer to sell, as seed, only the portion of a crop produced from PVPA-protected seed that the farmer grew for the purpose of saving and using it to plant another crop. That means, as a practical matter, that the amount of seed that a farmer can sell, as seed, is limited to the amount reasonably necessary for the same farmer to produce another crop.

a. The first sentence of Section 2543 consists of two parts: an opening clause, followed by a proviso. The opening clause allows a farmer, subject to the restrictions set forth in Section 2541(3) and (4), to save seed produced by the farmer from PVPA-protected seed and to use that saved seed for certain purposes. The proviso to the first sentence allows the farmer to sell that "saved seed" to other farmers for seeding purposes.<sup>5</sup> The question in this case is: How much of the seed produced by a farmer from PVPA-protected seed may be saved, under the opening clause of Section 2543's first sentence, so as to be sold, as seed, to another farmer under the proviso to the first sentence?

The answer to that question, we submit, is found in Section 2541(3). Section 2541(3) is relevant because the opening clause of Section 2543 expressly provides that a farmer may neither "save" seed nor "use" it, if to do so would constitute an infringement under Section 2541(3) (or under Section 2541(4), which proscribes use of protected seed to produce a hybrid and

<sup>5</sup> The second sentence of Section 2543 allows a farmer to sell the crop that the farmer has produced from PVPA-protected seed for consumption purposes.

which is not implicated here). Section 2541(3), in turn, provides that it is an infringement to "sexually multiply the novel variety as a step in marketing (for growing purposes) the variety." 7 U.S.C. 2541(3). We think that this provision limits the *purposes* for which a farmer may save seed under the opening clause of the first sentence of Section 2543 and, consequently, also limits the *amount* of seed that may be saved and then sold as seed.

Under the opening clause of Section 2543, the farmer may save the seed "produced by him from" PVPA-protected seed. Under Section 2541(3), however, the farmer may not have "produced"—i.e., "sexually multipl[ied]"—that seed "as a step in marketing" the seed "for growing purposes." Thus, if the farmer has "produced" the seed for the purpose of "marketing" it as seed, the farmer's conduct violates Section 2541(3) and falls outside of the protection of Section 2543.

The Act does not define the term "marketing." In the absence of a statutory definition, it is appropriate to assign the word its common meaning. See, e.g., *Federal Deposit Insurance Corp. v. Meyer*, No. 92-741 (Feb. 23, 1994), slip op. 5. In common usage, "marketing" encompasses "selling."<sup>6</sup> Applying that meaning of the term in Section 2541(3) leads to the conclusion that a farmer may not plant a PVPA-protected variety and thereafter save the seed produced by the planting

<sup>6</sup> See *Webster's Third New International Dictionary of the English Language* 1393 (1986) (defining "marketing" to mean "the act of selling or purchasing in a market; \* \* \* an aggregate of functions involved in transferring title and in moving goods from producer to consumer including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and supplying market information"); *The Random House Dictionary of the English Language* 1177 (2d ed. 1987) (defining "marketing" to mean "the act of buying or selling in a market[;] \* \* \* the total of activities involved in the transfer of goods from the producer or seller to the consumer or buyer, including advertising, shipping, storing, and selling").

with the purpose of selling it for use as seed. The farmer must act with some other purpose.<sup>7</sup>

The other, permissible purposes for which a farmer may produce and save seed from PVPA-protected seed are set forth in the opening clause of Section 2543. The farmer may "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section." 7 U.S.C. 2543. In other words, the farmer may use the saved seed produced from protected seed only in order to produce another crop, which the farmer in turn may use on his or her own farm (for example, for animal feed, personal consumption, or replanting) or may sell to others in accordance with the second sentence of Section 2543. Under the opening clause of Section 2543, therefore, the farmer, having obtained PVPA-protected seed, may plant that seed and save, from the resulting crop, enough seed to plant another crop, *ad infinitum*. In addition, the farmer may (also under the opening clause) keep the resulting crop for use on the farm (*i.e.*, for personal consumption), or (under the second sentence of Section 2543) sell the resulting crop to others for consumption purposes.<sup>8</sup>

<sup>7</sup> Nothing in the text of Section 2541(3), which refers to "marketing" without qualification, justifies the court of appeals' conclusion that Section 2541(3) prohibits only one "form of marketing," *i.e.*, "extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet. App. 12a-13a. And, as discussed above, the court of appeals' restrictive reading cannot be squared with the ordinary meaning of "marketing," which, even in its narrower denotation, encompasses all selling activities.

<sup>8</sup> The court of appeals misread the portion of the opening clause of Section 2543 that permits a farmer to "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section." The court of appeals believed that the phrase "for sale as provided in this section" modifies the word "seed," and the court accordingly read the clause in which the phrase appears to permit the sale of saved seed. See Pet. App. 7a. In our view, however, the "for sale" phrase modifies the word "crop," so that the clause of which it is a part refers not to the sale of the saved seed (as

The sale of "saved seed" for use as seed is permitted under the proviso to the first sentence of Section 2543, which states:

*Provided, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.*

Thus, the seed that a farmer may sell for use as seed under the proviso to the first sentence of Section 2543 is the seed that the farmer is entitled to save under the opening clause of the first sentence. As we have explained above, under the opening clause, the farmer is entitled to save seed only to produce another crop, either for use on the farm or for sale (for non-reproductive purposes). Consequently, as the district court concluded (albeit by somewhat different reasoning), sales of "saved seed" permitted under the proviso to the first sentence of Section 2543 are limited to the seed that the farmer has saved to produce another crop. Pet. App. 21a-24a.<sup>9</sup>

Although the permissibility of selling seed produced from PVPA-protected seed for seeding purposes thus turns on the purpose for which the farmer produced the seed, we think that in infringement actions the courts would ordinarily not need to conduct an elaborate inquiry into the farmer's subjective intent at the time of planting; it would be appropriate for a

provided in the proviso to the first sentence of Section 2543), but to the sale of the *crop* produced from the saved seed (as provided in the second sentence).

<sup>9</sup> We agree with the court of appeals (Pet. App. 11a-12a) that the phrase "for seeding purposes," on which the district court relied (*id.* at 21a), does not modify "saved"; rather, it modifies "obtained," and refers to the purpose for which the seed was obtained by authority of the owner.



court to infer the farmer's purpose from the amount of seed that the farmer saved. If the farmer saved more seed than he or she reasonably could use to produce another crop, and thereafter sells that seed to others for use as seed, it would be reasonable to infer that the farmer produced the seed from the outset with the purpose of selling it to others for use as seed, in violation of Section 2541(3). That inference would be especially well founded when, as in this case, the amount of seed that was saved and sold for seeding purposes exceeded by many times over the amount needed for replanting.<sup>10</sup>

b. The interpretation of Section 2543 that we have offered above is buttressed by consideration of the PVPA as a whole. See *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1565 (1993) (meaning of statutory language depends on context). Congress enacted the PVPA to "afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties." 7 U.S.C. 2581. The primary form of encouragement provided under the Act is the grant of exclusive rights to the developers of new varieties for an 18-year period, including the exclusive right to sell, import, and export a protected variety. 7 U.S.C. 2483(a). Most of the PVPA is devoted to explicating those rights, defining what actions infringe them, and providing for their enforcement through a certification process and private infringement actions.

Section 2543 carves out an exception to the exclusive rights otherwise afforded by the PVPA. Consistent with that function, Section 2543 should be read to permit only those limited sales of saved seed by a farmer that are necessary to prevent

<sup>10</sup> Assuming, as the district court did (Pet. App. 22a n.3) and as petitioner asserts (Pet. 3), that it takes one bushel of soybeans to plant one acre, the Winterboers would have needed to save 265 bushels of soybeans to produce a crop of the same size as the crop they produced in 1990. See Pet. App. 35a. The amount of soybeans that they actually saved, and sold as seed, was more than 38 times that amount: 10,259 bushels. *Ibid*.

wasting of the saved seed if the farmer's replanting plans change. That interpretation affords appropriate financial protection for the farmer, while at the same time protecting the legitimate expectations of the owner of exclusive rights in the novel variety at the time it sold the seed to the farmer. As Judge Newman explained in dissenting from the denial of rehearing en banc, "[t]he statute was not designed to place farmers in the seed business." Pet. App. 32a. Our interpretation of Section 2543 does not permit farmers to plant a novel variety of seed for the purpose of producing seed to sell in competition with the owner of protected rights in the novel variety. The Federal Circuit's interpretation, in contrast, permits farmers to do precisely that with up to half of each crop produced from protected seed. That result cannot be squared with the PVPA as a whole.

c. Our interpretation of Section 2543 is also consistent with its legislative history, which shows that Section 2543 was intended to permit only limited sales of seed by farmers for seeding purposes. There was no provision allowing farmers to sell "saved seed" for seeding purposes in the original versions of the bills that became the PVPA. Instead, those bills included a "saved seed" provision, which allowed a farmer to save only enough of the seed produced from protected seed for replanting, and a separate "crop exemption" provision, which allowed farmers to sell the crop produced from protected seed for consumption (not planting) purposes.<sup>11</sup>

<sup>11</sup> Under the proposed "saved seed" provision, unless the seed was grown as a step in marketing seed or for producing a hybrid, a farmer could have saved seed from a PVPA crop "and grow[n] the resulting variety for his own use." S. 3070, 91st Cong., 1st Sess. § 112 (1969); H.R. 13,631, 91st Cong., 1st Sess. § 112 (1969). Under the proposed "crop exemption" provision, it would not have been an infringement to sell seed saved under the "saved seed" provision "for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose." S. 3070, *supra*, § 114; H.R. 13,631, *supra*, § 114.



The right to sell "saved seed" for seeding purposes was added to the final bill, when the "saved seed" and "crop exemption" provisions were combined into what became Section 2543. As described in the committee reports, Section 2543

authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; to save seed from such crop for future use or planting on the farm; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed for reproductive purposes to other persons so engaged.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 12 (1970) (same). That description makes clear that under Section 2543 a farmer may sell, for seeding purposes, only such PVPA-descended seed as the farmer has saved for the farmer's own use. Thus, as the district court recognized, Congress contemplated only sales of limited amounts of seed, occasioned by a change in the selling farmer's planting plans. Pet. App. 22a.

d. The Federal Circuit recognized that "without meaningful limitations, [Section 2543] could undercut much of the PVPA's incentives." Pet. App. 12a. The limitations the court adopted, however, find no support in the text or legislative history of the Act.

The Federal Circuit based its holding that a farmer may sell up to 50% of a crop as brown bag seed upon its interpretation of the requirement in the proviso to the first sentence of Section 2543 that both the seller and the buyer of saved seed have, as their "primary farming occupation," the "growing of crops for sale for other than reproductive purposes." 7 U.S.C. 2543. The Federal Circuit adopted a "crop-by-crop" approach to determining whether that requirement is satisfied, reasoning that, as long as 50% or more of each crop is sold for non-

reproductive purposes, the farmer's "primary farming occupation," with respect to that crop, is the growing of the crop for sale for non-reproductive purposes. Pet. App. 8a. Nothing in the text or legislative history of Section 2543, however, suggests that courts should use a crop-by-crop approach instead of, for example, an approach based on the primary source of the farmer's total income. The Federal Circuit's adoption of a crop-by-crop approach seems to have been influenced more by a desire to impose some limit on its otherwise unbounded interpretation of Section 2543 than by a desire to divine the meaning that emerges from the statutory text.

There is likewise no support in the text of Section 2543 for the court's determination that a farmer who purchases brown bag seed cannot save any portion of the seed produced from it. See Pet. App. 6a; p. 6, *supra*. Section 2543 permits a farmer to save seed "produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety." 7 U.S.C. 2543 (emphasis added). Brown bag seed is plainly "descended from" seed obtained by authority of the owner.

As discussed above, the operative limitation on the amount of saved seed that a farmer may sell under Section 2543 is found in its incorporation of the prohibition in 2541(3) against sexually multiplying a protected variety of seed as a step in marketing it for use as seed. The court of appeals erred by failing to give effect to that limitation, which is imposed by the Act itself, and by adopting other limitations that have no basis in the Act.<sup>12</sup>

<sup>12</sup> Respondents cite (Br. in Opp. 14-15 & nn.4-6) three documents obtained from the Department of Agriculture that they contend endorse the court of appeals' interpretation of Section 2543. Respondents' reliance on those documents (copies of which we have lodged with the Clerk of this Court) is misplaced. The earliest such document is a 1973 letter from a PVPO commissioner that seeks to answer certain "hypothetical" questions and states that the only limitation on brown bag sales is the requirement that the selling farmer's and the buying farmer's "primary farming

2. a. The Federal Circuit's erroneous interpretation of Section 2543 warrants review by this Court, because it "nullifies" the economic incentive that Congress intended the PVPA to provide for plant breeders to assume the costs and risks of developing new varieties. Pet. App. 30a (Newman, J., dissenting from denial of rehearing en banc). As a result, the decision could seriously harm the public interest and the competitiveness of United States agriculture.

The Federal Circuit's decision allows a farmer to sell up to 50% of the crop produced from PVPA-protected seed to other farmers for seeding purposes. See Pet. App. 8a. That means in the case of soybeans, for example, that in a single crop cycle a farmer may produce and sell, as seed, up to 22 and 1/2 times the amount of soybeans that the owner of the variety sold to the farmer (based on a yield of 45 bushels for each bushel

occupation" be the growing of crops for non-reproductive purposes. The 1973 letter does not address the "marketing" prohibition in Section 2541(3) or indicate to what extent the author's view represents the position of the Department. The second document, a PVPO "Activity Report" from October 1987, concerns the Department's authority to issue regulations concerning the scope of Section 2543; the document says nothing about the meaning of Section 2543. The third document is a report co-authored by a USDA agricultural economist and an outside economist, surveying "Intellectual Property Rights and the Private Seed Industry" (USDA, Economic Research Service, *Agricultural Economic Report* No. 654 (1991)). That report refers (at 4) to a district court decision for the proposition that under the PVPA "49% of a harvest can be sold as seed." The report does not suggest that the Department had independently come to that view. Thus, none of the documents cited by respondents purports to state a formal agency determination regarding the questions of statutory interpretation presented here. It is therefore not surprising that the court of appeals did not cite any of the documents in its opinion, even though respondents cited them in their briefs below. See Resp. C.A. Br. 32-33 & n.21; Resp. C.A. Reply Br. 28-32. In any event, the Department of Agriculture has now carefully considered the questions presented here, and its views are those set forth in this brief.

planted). See Pet. App. 32a n.2.<sup>13</sup> The Federal Circuit's interpretation thus essentially wipes out the value of the owner's "exclusive" right to sell the novel variety.

b. Contrary to respondents' suggestion (Br. in Opp. 16-17), the absence of a conflict among the lower courts with respect to the question presented here does not weigh against further review. No conflict can develop among the courts of appeals, because the Federal Circuit has exclusive jurisdiction over appeals from district court decisions in infringement actions under the PVPA. 28 U.S.C. 1295(a)(1). And no conflict can develop between the Federal Circuit and any state court, because the federal district courts' original jurisdiction over infringement actions is exclusive. 28 U.S.C. 1338. Under these circumstances, the absence of a conflict among the lower courts does not render further review unwarranted. See, e.g., *Keene Corp. v. United States*, 113 S. Ct. 2035, 2039 (1993).

c. The legislative proposals to which respondents refer (Br. in Opp. 19 & n.9) have little bearing on the need for further review. The proposals cited by respondents are bills introduced in each House of Congress (S. 1406, 103d Cong., 1st Sess. § 9 (1993), and H.R. 2927, 103d Cong., 1st Sess. § 9 (1993)) that would amend 7 U.S.C. 2543 by striking out the proviso to the first sentence of Section 2543, thereby eliminating the authority of farmers to sell "saved seed" to other farmers for use as seed. The bills are intended to implement a provision in the International Convention for the Protection of New Varieties of Plants, Mar. 19, 1991 (known by the French acronym "UPOV") (1991 UPOV), to which the United States is a signatory. Specifically, Article 14(1) of the 1991 UPOV,

<sup>13</sup> By comparison, as we interpret it, Section 2543 would generally permit a farmer to sell, as seed, no more than 1/45 (or about 2%) of the crop produced from a PVPA-protected variety of soybean, which would represent the same amount of seed that the farmer purchased from the owner of the variety to produce the crop. See Pet. App. 11a.



requires prior authorization of the owner before a protected variety may be offered for sale as seed.

The bills are in their most preliminary stages, as respondents concede. Br. in Opp. 19 n.9. The Senate bill was the subject of a hearing before the Senate Committee on Agriculture, Nutrition and Forestry on September 20, 1993, but the bill has not yet been reported out of that committee. There have been no committee hearings on the House bill. Although the President supports the bills as introduced and is urging prompt congressional action on them, it is not clear that Congress will take action during its current session, because the United States is not under any immediate deadline to achieve compliance with the 1991 UPOV.<sup>14</sup> Action on the bills during the current session of Congress is also uncertain because of controversy over other aspects of the bills unrelated to the "saved seed" exemption.

In any event, even if the bills were enacted in their current form, further review of the decision below would be warranted. In their current form, the bills would amend the PVPA prospectively; the amendments would not affect the rights of holders of current certificates of plant variety protection issued under the PVPA, with respect to varieties covered by such certificates or by applications for such certificates on file at the time the amendments are enacted.<sup>15</sup> Thus, the

<sup>14</sup> The 1991 UPOV will not enter into force until at least five countries, including at least three current UPOV members, have deposited their instruments of accession (1991 UPOV, Art. 37), which has not yet occurred. In the meantime, U.S. breeders who hold PVPA certificates continue to enjoy certain protections under the 1978 UPOV, with which the United States has achieved compliance, and they would continue to enjoy those protections even if the United States were not to ratify the 1991 UPOV, since the United States would continue to be a member of UPOV under the 1978 Convention. See 1991 UPOV, Art. 31.

<sup>15</sup> See S. 1406, *supra*, § 12(a) (providing that, with exceptions not pertinent here, "any variety for which a certificate of plant variety

decision below, unless reversed by this Court, will permit farmers to sell, for seeding purposes, up to 50% of each crop produced from varieties protected by current certificates, regardless of whether the bills are enacted. Because some of those certificates will remain in effect for as long as 18 more years, the decision below will have a continuing adverse financial impact on the breeders of novel varieties for years to come. It is reasonable to expect that such financial harm will lead breeders to cut back their investment in the research and development of novel varieties. See American Seed Trade Ass'n Amicus Br. 11-14. Such a result would be detrimental to the public interest and directly contrary to the text and express purposes of the PVPA. See pp. 12-13, *supra*.

d. Finally, although respondents do not raise the point in opposing certiorari, we note that the interlocutory posture of this case does not detract from its suitability for review. This case presents a pure issue of statutory interpretation, and the decision below resolves that issue in a definitive manner. Further proceedings on remand are unlikely to shed any light on the proper resolution of the issue or to diminish its importance.<sup>16</sup> In similar circumstances, the Court has granted

protection has been issued prior to the effective date of this Act, and any variety for which an application is pending on the effective date of this Act, shall continue to be governed by the Plant Variety Protection Act \* \* \*, as in effect on the day before the effective date of this Act"); H.R. 2927, *supra*, § 12(a) (same).

<sup>16</sup> The court of appeals left for remand the question whether the Winterboers' sales were exempt from infringement liability under the court's interpretation of Section 2543. Pet. App. 12a. It is possible that the sales would not be entirely exempt under that interpretation. For example, it appears that the Winterboers sold, for use as seed, more than 50% of the crops they produced from PVPA-protected seeds. See *id.* at 4a, 35a. In addition, it is unclear whether the Winterboers engaged in "marketing," as the court of appeals understood that term. See *id.* at 12a-13a. Nonetheless, we do not believe, on balance, that the possibility that Asgrow would prevail on remand counsels against further review at this time. For each



certiorari to review legal determinations by a court of appeals, even though the underlying litigation could conceivably be resolved on other grounds. See, e.g., *Gollust v. Mendell*, 111 S. Ct. 2173 (1991); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, No. 92-854 (argued Nov. 30, 1993).<sup>17</sup>

planting season that the Federal Circuit's erroneous (yet binding) interpretation of Section 2543 remains in effect, the developers of novel varieties of seed will suffer significant economic losses, and investment in the development of novel varieties will be stifled, causing harm to the public interest.

<sup>17</sup> The court of appeals also held that sales of saved seed permitted by Section 2543 are not subject to the requirement in Section 2541(6) that the seller of PVPA-protected seed provide notice to the purchaser of the protected status of the seed. Pet. App. 13a. Although petitioner challenges that holding in Question 2 of its petition (at i), we do not believe that the issue whether Section 2541(6) applies to brown bag sales would, standing alone, warrant review of the decision below. Our view is due in part to uncertainty about whether the issue was properly before the panel, and to the fact that it was not fully briefed, as Judge Lourie noted in his concurring opinion. Pet. App. 14a; see also *id.* at 25a (district court declines to rule on Section 2541(6) issue). Nonetheless, if the Court concludes that the first question presented warrants certiorari, it would be appropriate to grant certiorari on the second question as well. A determination of whether a farmer who makes brown bag sales of seed must provide notice to the purchaser that the seed is protected under the PVPA would be important in any infringement action against the purchaser. See 7 U.S.C. 2567 (damages recoverable only from infringer who had notice that he or she was selling a protected variety).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III  
*Solicitor General*

FRANK W. HUNGER  
*Assistant Attorney General*

EDWIN S. KNEEDLER  
*Deputy Solicitor General*

RICHARD H. SEAMON  
*Assistant to the Solicitor General*

BARBARA C. BIDDLE  
WENDY M. KEATS  
*Attorneys*

MARCH 1994

JUN 10 1994

OFFICE OF THE CLERK

No. 92-2038

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

---

ASGROW SEED COMPANY,  
*Petitioner,*

v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a/ DEEBEES,  
*Respondents.*

---

**On Writ Of Certiorari To The United States  
Court Of Appeals For The Federal Circuit**

---

**JOINT APPENDIX**

---

RICHARD L. STANLEY  
Arnold, White & Durkee  
750 Bering Drive  
Suite 400  
Houston, Texas 77057  
(713) 787-1400

WILLIAM H. BODE  
William H. Bode & Associates  
1150 Connecticut Ave., N.W.  
Ninth Floor  
Washington, D.C. 20036  
(202) 828-4100

*Counsel for Petitioner*

*Counsel for Respondents*

---

**PETITION FOR WRIT OF CERTIORARI FILED JUNE 23, 1993  
WRIT OF CERTIORARI GRANTED APRIL 18, 1994**

---

## JOINT APPENDIX

## TABLE OF CONTENTS

	Page
Chronological List Of Relevant Docket Entries <i>Asgrow Seed Co. v. Winterboer</i> , et al, No. 91- CV-4013, United States District Court for the Northern District of Iowa . . . . .	1
Chronological List Of Relevant Docket Entries, <i>Asgrow Seed Co. v. Winterboer</i> , No. 92-1048, United States Court of Appeals for the Federal Circuit . . . . .	8
Letter to Dr. W. R. Fehr from S. F. Rollin Commissioner, Plant Variety Protection Office, Grain Division (April 19, 1973) . . . . .	13
<i>Plant Variety Protection</i> , Iowa Certified Seed News, September-October 1984, pp. 1-2 . . . . .	16
<i>Plant Variety Protection</i> , Iowa Certified Seed News, November-December 1985, p. 2 . . . . .	18
Memorandum to Paul Fuller, Director, Live- stock and Seed Division from Kenneth H. Evans, Commissioner, Plant Variety Protection Office (October 18-24, 1987) . . . . .	20
Memorandum to Paul M. Fuller, Director, Live- stock and Seed Division from Kenneth H. Evans, Commissioner, Plant Variety Protection Office (March 9, 1988) . . . . .	21



Report Of PVP Farmers' Exemption Study Committee (April 1988) (with Roster of Study Committee Appended) . . . . .	23
Memorandum to Thomas M. Walsh, Assistant General Counsel, Marketing Division, OGC from Paul M. Fuller, Director, Livestock and Seed Division (circa August 26, 1988) . . . . .	32
Mary Knudson and LeRoy Hansen, Intellectual Property Rights and the Private Seed Industry, 4-5 (United States Department of Agriculture, Economic Research Service, <i>Agricultural Economic Report</i> No. 654 (1991)) . .	34
Complaint For Preliminary Relief And Permanent Injunction And Damages (filed January 24, 1991) (exhibits omitted). . . . .	36
Answer (filed February 13, 1991) . . . . .	42
The following opinions, judgments, orders, and materials have been omitted from the printing of the Joint Appendix because they appear on the following pages in the Appendix to the Petition for Certiorari ("Pet.App."):	
District Court Opinion, 795 F. Supp. 915 (N. D. Iowa Sept. 30, 1991), modified on reconsideration, (November 14, 1991) . . . . .	15a
Court of Appeals Opinion, 982 F.2d 486 (Fed. Cir. Dec. 21, 1992) . . . . .	1a

Court of Appeals Decision Denying Rehearing And Declining Suggestion For Rehearing In Banc, 989 F.2d 478 (Fed. Cir. March 25, 1993), with Concurring Opinion by Judge Rader entered March 29, 1993) and with Dissenting Opinion by Judge Newman (entered March 25, 1993) . . . . .	27a
Court of Appeals Order Staying Mandate (Fed. Cir. April 12, 1993) . . . . .	39a
Full Text of 7 U.S.C. § 2541 . . . . .	40a
Full Text of 7 U.S.C. § 2543 . . . . .	41a

**CHRONOLOGICAL LIST OF RELEVANT  
DOCKET ENTRIES IN DISTRICT COURT**

U.S. District Court  
Northern District of Iowa (Western)

**CIVIL DOCKET FOR CASE #: 91-CV-4013**

Filed: 01/24/91

Asgrow Seed Company v.

Winterboer, et al

Assigned to: Judge

Donald E O'Brien

Demand: \$0,000

Lead Docket: None

Dkt# in other court: None

Nature of suit: 891

Jurisdiction: Federal

Question

Cause: 07:2321 Plant Variety Protection Act

1/24/91

Complaint (Summons(es) w/notice,  
consents, LR16 and reports to atty for  
svc) Schedule Rpt ddi 05/24/91 (jh)  
[Entry date 01/14/93]

2/13/91

ANSWER by defendants Dennis  
Winterboer, Becky Winterboer to  
Complaint [1-1] (jh) [Entry Date  
01/14/93]

2/13/91

MOTION by plaintiff Asgrow Seed  
Company for preliminary injunction,  
for immediate hearing w/attach (note  
to law clerk) assigned to Judge Donald  
E. O'Brien (jh) [Entry date 01/14/93]

2/13/91 MEMORANDUM Brief by plaintiff Asgrow Seed Company in support of motion for preliminary injunction [4-1] (jh) [Entry date 01/14/93]

2/15/91 RESISTANCE by defendants Dennis Winterboer, Becky Winterboer to motion for preliminary injunction [4-1] (jh) [Entry date 01/14/93]

2/19/91 AFFIDAVIT of Craig A Raby (jh) [Entry date 01/14/93]

3/5/91 MEMORANDUM Brief by defendants Dennis Winterboer, Becky Winterboer in opposition to motion for preliminary injunction [4-1] (jh) [Entry date 01/14/93]

3/8/91 REPLY Brief by plaintiff Asgrow Seed Company re in support of motion for preliminary injunction [4-1] (jh) [Entry date 01/14/93]

3/26/91 MOTION by defendants Dennis Winterboer, Becky Winterboer to strike testimony of Dale Porter w/attach assigned to Judge Donald E. O'Brien (jh) [Entry date 01/15/93]

4/30/91 STIPULATED ORDER by Judge Donald E. O'Brien setting aside motion for preliminary injunction [4-1]; Issue of liability bifurcated from all other issues in cause and determined whether by motion or trial

b/f any other issues determined; motion for SJ filed by May 24, 1991; opposition to motion for SJ by June 10, 1991; any reply briefs by June 19, 1991 (see text) (cc: all counsel) (jh) [Entry date 01/15/93]

5/8/91 MEMORANDUM of Law by plaintiff Asgrow Seed Company in opposition to motion to strike testimony of Dale Porter [21-1] (jh) [Entry date 01/15/93]

5/23/91 MOTION by plaintiff Asgrow Seed Company for summary judgment assigned to Judge Donald E. O'Brien (jh) [Entry date 01/15/93]

5/23/91 STATEMENT of undisputed facts by plaintiff Asgrow Seed Company in support of motion for summary judgment [27-1] w/attach (jh) [Entry date 01/15/93]

5/23/91 MEMORANDUM of Law by plaintiff Asgrow Seed Company in support of motion for summary judgment [27-1] (jh) [Entry date 01/15/93]

5/24/91 MOTION by defendants Dennis Winterboer, Becky Winterboer for summary judgment assigned to Judge Donald E. O'Brien (jh) [Entry date 01/15/93]



5/24/91 MEMORANDUM by defendants Dennis Winterboer, Becky Winterboer in support of motion for summary judgment [31-1] (jh) [Entry date 01/15/93]

5/24/91 STATEMENT of facts as to which there is no genuine issue by defendants Dennis Winterboer, Becky Winterboer in support of motion for summary judgment [31-1] (jh) [Entry date 01/15/93]

6/7/91 RESISTANCE by plaintiff Asgrow Seed Company to motion for summary judgment [31-1] (jh) [Entry date 01/15/93]

6/7/91 RESPONSE by plaintiff Asgrow Seed Company to Defts Statement of Facts [33-1] (jh) [Entry Date 01/15/93]

6/7/91 MEMORANDUM Brief by plaintiff Asgrow Seed Company in opposition to motion for summary judgment [31-1] (jh) [Entry date 01/15/93]

6/10/91 AFFIDAVIT of Lawrence C Maxwell (refiling w/attach sealed envelope on correspondence side) (jh) [Entry date 01/15/93]

6/10/91 MEMORANDUM by defendants Dennis Winterboer, Becky Winterboer in opposition to motion for summary judgment [27-1] (jh) [Entry date 01/15/93]

6/14/91 MEMORANDUM Brief w/attach Table of Contents by plaintiff Asgrow Seed Company in opposition to motion for summary judgment [31-1] (jh) [Entry date 01/15/93]

6/17/91 REPLY Brief by plaintiff Asgrow Seed Company in support re motion for summary judgment [27-1] (jh) [Entry date 01/15/93]

6/19/91 REPLY Memorandum by defendants Dennis Winterboer, Becky Winterboer in support re motion for summary judgment [31-1] (jh) [Entry date 01/15/93]

7/1/91 AFFIDAVIT of Gary Starwalt w/attach (notified atty no cert of svc) (jh) [Entry date 01/15/93]

7/19/91 MINUTES: ruling reserved on pltfs motion for summary judgment [27-1], ruling reserved on defts motion for summary judgment [31-1], ruling reserved on defts motion to strike testimony of Porter [21-1]; parties send letter (jh) [Entry date 01/15/93]

9/30/91 ORDER by Judge Donald E. O'Brien granting motion for summary judgment [27-1], granting motion for preliminary injunction [4-1] defts enjoined from selling seed, except for

saved seed, to other farmers and/or engage in any form of "brown bagging"; denying motion for summary judgment [31-1]; separate proceeding held at courts earliest convenience to determine damages, parties file brief addressing 7USC2567 and potential effect on amount of damages could be awarded in action (cc: all counsel) (jh) [Entry date 01/15/93]

10/28/91 BRIEF FILED on 7USC2567 by plaintiff Asgrow Seed Company (jh) [Entry date 01/15/93]

10/28/91 MOTION by plaintiff Asgrow Seed Company to clarify order assigned to Judge Donald E. O'Brien (order to Judge) (jh) [Entry date 01/15/93]

10/28/91 NOTICE OF APPEAL to US Court of Appeals for Federal Circuit by defendants Dennis Winterboer, Becky Winterboer from Dist. Court decision (order of Sept 30, 1991) [49-1] (cc: all counsel) w/dkt sheet US CCA w/dkt sheets, Order (jh) [Entry date 01/15/93]

11/12/91 MOTION by defendants Dennis Winterboer, Becky Winterboer to stay proceedings pending appeal w/attach assigned to Judge Donald E. O'Brien (jh) [Entry date 01/15/93]

11/14/91

ORDER by Judge Donald E. O'Brien granting motion to clarify order [51-1] Footnote 5 on page 10 of court order of Sept 30, 1991 stricken and following substituted (see text); what court deciding in order was that question of any violation of labeling portion of the Plan Variety Protection Act need not be addressed as a violation found under other sections (cc: all counsel) (certified copies to Federal Circuit and 8th Circuit) (jh) [Entry date 01/15/93]

1/22/92

TRANSCRIPT of hearing held on July 19, 1991 (in clerks office) (jh) [Entry date 01/15/93]

CHRONOLOGICAL LIST OF RELEVANT DOCKET  
ENTRIES IN COURT OF APPEALS

Term and Docket No. 92-1048

November 14, 1991 Notice of appeal and certified list,  
docketed. Notice sent to the parties.  
(jb)

Jan 13, 1991 BRIEF FOR THE APPELLANT,  
filed. (MS-1/13/92) (cr)

9. APPELLEE'S - MOTION TO  
STRIKE UNDER RULES 2 AND 27  
AND FOR COURT TO TAKE  
JUDICIAL NOTICE UNDER  
FED.R.EVID. 201(B)(2). (30)  
DEFERRED TO MERITS PANEL  
ASSIGNED TO HEAR THIS CASE.  
BY: MOTIONS PANEL. JUDGE:  
RICH. (MS-02/04/92) FILED:  
02/05/92. REPLY 1 (13) FILED:  
02/18/92. (EOD 03/09/92 BY ETW)  
92-1048

Feb 25, 1992 BREIF FOR THE APPELLEE, filed.  
(MS-2/25/92) (cr)

Mar 9, 1992 BREIF FOR AMICUS CURIAE  
(*Jacob Hartz seed Co. Inc.*) filed.  
(MS-2/25/92) (cr)

Mar 9, 1992 BRIEF FOR AMICUS CURIAE  
(*Pioneer Hi-Bred Inter, Inc.*) filed.  
(HD-2/21/92) (cr)

Mar 9, 1992 BRIEF FOR AMICUS CURIAE  
(*Northrup King Co*) filed. (MS-  
3/21/92) (cr)

Mar 9, 1992 BRIEF FOR AMICUS CURIAE  
(*The Dole Fresh Vegetables, Inc.*)  
filed. (MS-2/21/92) (cr)

Mar 9, 1992 BREIF FOR AMICUS CURIAE  
(*The Agrigenetics Company*) filed.  
(MS-2/21/92) (cr)

Mar 9, 1992 BREIF FOR AMICUS CURIAE  
(*Agripro Biosciences Inc.*) filed.  
(MS-2/20/92) (cr)

Mar 9, 1992 BRIEF FOR AMICUS CURIAE  
(*Delta and Pine Land Co.*) filed.  
(MS-2/25/92) (cr)

Mar 9, 1992 BRIEF FOR AMICUS CURIAE  
(*Golden Harvest Seed, Inc.*) filed.  
(MS-2/25/92) (cr)

Mar 9, 1992 BRIEF FOR AMICUS CURIAE  
(*Of Dekalb plant Genetics*) filed.  
(MS-2/25/92) (cr)

Mar 9, 1992 BRIEF FOR AMICUS CURIAE  
(*American Seed Trade Asso*) filed.  
(MS-2/21/92) (cr)

Mar 9, 1992 BRIEF FOR AMICUS CURIAE  
(*Stonville Pedigreed Seed Co.*) filed.  
(MS-2/24/92) (cr)



Mar 9, 1992 BRIEF FOR AMICUS CURIAE  
(corrected)  
(Tanimura & Antle, Inc.) filed. (MS-  
2/24/92) (cr)

Mar 23, 1992 REPLY BRIEF FOR APPELLANTS,  
filed. (MS-3/23/92) (cr) [40 page  
limitation allowed per Order dated  
3/9/92 (#30)]

Mar 30, 1992 JOINT APPENDIX Vols-I-II 12  
copies each filed. (MS-3/30/92) (cr)

32. APPELLEE'S - MOTION  
UNDER RULES 27 AND 30 TO  
FILE A SUPPLEMENTAL  
APPENDIX, AT ITS EXPENSE.  
(MS-04/20/92) FILED: 04/21/92.  
ACTION ON MOTION (34):  
GRANTED. BY MERITS PANEL.  
FILED: 04/24/92. (EOD 04/24/92  
BY DF) 92-1048

April 24, 1992 SUPPLEMENTAL APPENDIX FOR  
APPELLEE, filed. (MS-4/21/92) (cr)

May 7, 1992 ARGUED. (Lourie & Rader, JJ, &  
Smith, SJ). (tth)

37. APPELLANT'S CITATION OF  
SUPPLEMENTAL AUTHORITY.  
(SENT TO PANEL) RECEIVED:  
05/08/92 (EOD 05/08/92) (LP) 92-  
1048

December 21, 1992 **REVERSED AND REMANDED**  
(Rader, J) "JUDGMENT ENTERED"  
(jb)  
Each party shall bear its own costs.  
Separate opinion (Lourie, J)  
concurring.

**APPELLEE - COMBINED  
PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING IN  
BANC (MS-01/13/93) FILED:  
01/14/93 PETITION CIRCULATED:  
01/21/93 SUGGESTION  
CIRCULATED: 02/02/93  
RESPONSE REQUESTED FROM:  
APPELLANT (WINTERBOER,  
D/B/A DEEBEE'S) RESPONSE  
DUE: 02/18/93 RESPONSE FILED:  
02/18/93 RESPONSE  
CIRCULATED: 02/19/93 REPLY  
RESPONSE FILED AND  
CIRCULATED: 03/05/93  
PETITION/SUGGESTION:  
DENIED/DECLINED ON 03/25/93.  
(EOD 03/25/93 BY BAH) 92-1048  
HN, PN, GA, PM, JP would rehear.  
Dissenting opinion by PN. (Pub.)**

\* \* \*

March 29, 1993 Separate order by Rader, Circuit  
Judge, concurring in the denial of  
rehearing en banc. (Pub.) (pjt)

42. APPELLEE'S - MOTION TO  
STAY THE MANDATE PENDING

FILING AND DISPOSITION OF A WRIT OF CERTIORARI. (FS-04/01/93) FILED: 04/01/93. REPLY 1 (43) FILED: 04/06/93. ACTION ON MOTION (44): GRANTED. BY MERITS PANEL. FILED: 04/13/93. (EOD 04/13/93 BY LP) 92-1048

45. PETITION FOR WRIT OF CERTIORARI FILED 06/23/93, SUPREME COURT #: 92-2038. U.S.L.W.: 62-3001 (EOD 07/13/93 BY JA) 92-1048

46. PETITION FOR WRIT OF CERTIORARI FILED 06/23/93, SUPREME COURT #: 92-2038. CERT. GRANTED ON 04/18/94. U.S.L.W.: 62-3690 (EOD 04/29/94 BY JA) 92-1048

APR 19 1973

Dr. W. R. Fehr  
Agronomy Department  
Iowa State University  
Ames, Iowa 50010

Dear Dr. Fehr:

Since you have not been designated as a representative of Improved Variety Research, Inc., this Office cannot correspond with you regarding applications Nos. 72008 and 72009 on the 'Marshall' and 'Osage' varieties of soybean. We shall try to answer your questions as though they were hypothetical.

#### Situation I

(a) Both the farmer and the seedsman may infringe the rights of the owner under section 111(6) of the Plant Variety Protection Act by not properly marking or labeling a protected variety if the variety was properly marked when they received it.

(b) There is no limitation as to the amount of sales permitted a grower under section 113 of the Act except to the extent it may affect his "primary farming occupation" classification upon which the exemption is based. The courts will have to decide what is a farmer's primary farming occupation.

#### Situation II

(a) Any protected variety may be modified by incorporating a single gene without infringing on the owner's rights.

Situation III

- (a) A protected variety may be used in a blend.
- (b) The variety name may be preceded by an asterisk (\*) and a footnote may indicate that this particular component of the blend is protected.
- (c) A protected variety can be sold under any number of brand designations; however, it cannot be protected unless the variety name is given. As long as the labeling clearly indicates what is the variety name and what is the brand name the labeling will comply with both the Plant Variety Protection Act and the Federal Seed Act. The brand designation should be designated as such each time it is used; for example, "Jones Brand 'Oshkosh' soybean."

Situation IV

- (a) Another breeding company can legally select an off-type hilum color, increase it, and merchandize it without responsibility to the original breeder of a non-stable variety.

Situation V

- (a) No - a character must be stable as stated in section 41(a)(3) of the Act.
- (b) No - a character which is not stable cannot be protected as part of a variety description.

Situation VI

- (a) An application which was voluntarily abandoned on May 3, 1972, cannot now be revived as provided in section 180.23(b) of the regulations under the Act. It can be

reconsidered only by refiling, and payment of a new application fee as provided in section 180.23(c) of the regulations.

Situation VII

- (a) Only the owner of a variety can apply for protection. He may designate a representative to advance the application and pay the fees. The owner may assign or sell his rights to anyone (as with personal property) under any arrangement he desires.

Sincerely,

/s/ S. F. Rollin

S.F. Rollin  
 Commissioner, Plant Variety  
 Protection Office  
 Grain Division  
 cc:  
 C.R. Edwards  
 Interpretation File



**Iowa Certified Seed News**  
September - October 1984

**Plant Variety Protection**

The following are listings of plant varieties which could be grown in Iowa and which are protected under the Plant Variety Protection Act or the Plant Variety Protection Act-Title V option.

If a farmer whose primary occupation is the production of food and fiber, not seed, purchases a variety that IS NOT protected under the Title V option from a representative of the certificate holder, or a variety protected under the Title V option which was properly certified, he may sell seed produced from that purchased by variety name to another farmer whose primary occupation is the production of food and fiber, not seed. The second farmer, however, may not sell any seed produced by variety name. Sale of seed in a manner other than just outlined is a violation of the Plant Variety Protection Act. If a farmer advertises seed for sale IT IS ASSUMED that he is in the business of producing seed.

The number in parenthesis is that of the certificate holder, if published. An asterisk designates a variety for which application has been submitted as of December 31, 1983, but the certificate has not been issued. Such varieties are considered protected until the certificate is issued, the application is denied, or withdrawn.

The Roman number following a soybean variety is its Maturity Group and only Groups O through IV are listed unless the Maturity Group isn't available. A variety with a < > denotes a temporary designation. SRW following a

wheat variety means soft red winter, HRW means hard red winter, HRS means hard red spring, and SWW means soft white winter.

**Iowa Certified Seed News**  
November - December, 1985

**Plant Variety Protection**

The following are listings of plant varieties which can be grown in Iowa and which are protected under the Plant Variety Protection (PVP) Act or the Plant Variety Protection Acts — Title V option. I have attempted to be accurate, however, this is not a legal document and the final authority is the Plant Variety Protection Office, Agriculture Marketing Service, U.S. Department of Agriculture, Beltsville, MD 20705, therefore, they should be contacted with questions, but please notify me of typing errors.

If a farmer whose primary occupation is the production of food and fiber, not seed, purchases a protected variety he/she may sell seed produced from that purchased by variety name to another farmer whose primary occupation is the production of food and fiber, not seed. The second farmer, however, may not sell the seed purchased or any produced from that purchased by variety name. Sale of seed in a manner other than just outlined is a violation of the Plant Variety Protection Act. If a farmer advertises seed for sale IT IS ASSUMED he/she is the business of producing seed.

The number in parenthesis is that of the certificate holder, if published. An asterisk designates a variety for which application has been submitted as of August 8, 1985, for PVP — Title V or December 31, 1983, PVP. Such varieties are considered protected until the certificate is issued or the application is denied or withdrawn.

The Roman number following a soybean variety is its Maturity Group and only Groups O through IV are listed unless the Maturity Group isn't available. A variety with a

< > denotes a temporary designation. HRW following a wheat variety means hard red winter, HRS means hard red spring, SRW means soft red winter, and SWW means soft white winter.

October 18 - 24, 1987

TO: Paul Fuller, Director  
Livestock and Seed Division

FROM: Kenneth H. Evans, Commissioner  
Plant Variety Protection Office

SUBJECT: Activity Report

Visitor to the PVP Office: DR. NEIL RUTGER of the University of California at Davis visited with Dr. Joseph Higgins on October 22, 1987. Dr. Rutger is a rice breeder with many new rice varieties for California. During the morning conference, a revision of the Rice Variety Description form was carefully considered character by character.

OGC interpreted that PVPA Regulations cannot be amended to clarify farmers' exemption: The PVP Office received an interpretation from Alexander Samofal and Robert A. Ertman of the Office of General Counsel stating that the Plant Variety Protection Act does not give the Department of Agriculture sufficient authority to amend the Regulations to further define what is exempted under section 113 of the PVPA. The Plant Variety Protection Advisory Board had unanimously recommended that the farmers' exemption should be studied and clarified by regulations if possible. If it is not possible to clarify by regulations, they suggested that amending the PVPA should be considered.

March 9, 1988

TO: Paul M. Fuller, Director  
Livestock and Seed Division

FROM: Kenneth H. Evans, Commissioner  
Plant Variety Protection Office

SUBJECT: Farmers' Exemption Committee Meeting

The Farmers' Exemption Committee meeting in Chicago on March 8, 1988, had all members present. See the attached list of members.

They agreed that the PVPA was in the public interest and that the seed industry needs a return on their investment to maintain research for developing new varieties. In the morning session each member was given 10 minutes to present their organization's position. The afternoon session was a discussion of the problem and possible solutions to the problem. Although the original positions expressed were rather divergent, the discussion produced a rather harmonious acceptance of the final definition reached. The members drafted this definition to present to the groups they represent for comment.

Their present recommendation is to have AMS define "such saved seed" as follows:

"'Such saved seed' as used in section 113 shall mean an amount normally required, following customary practices, for the production of a crop on land farmed by the person saving seed."



The wording suggested for clarification of "such saved seed" is not much different from the wording in the Act and appears to be at least one possible interpretation of the Act according to some at the meeting. They indicated that the Act states:

. . . it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: . . . to sell such saved seed to other persons so engaged, for reproductive purposes, . . .

The members' intent in the definition was to limit the crop or farmers' exemption to seed one would normally save for planting one's own farm and allow the farmer to either plant that seed or sell it if planting plans were changed or a small amount of excess was saved.

Their intent is to get a ruling, probably an amendment to the regulations, out of Agriculture; failing that, to propose an amendment to the Act.

Attached are the hand-outs of those members having written preliminary statements.

# REPORT OF PVP FARMERS' EXEMPTION STUDY COMMITTEE

A broad-based Study Committee met in Chicago on March 8, 1988, to propose actions for reducing abuses of Section 113 of the Plant Variety Protection Act. In September 1987 the Plant Variety Protection Advisory Board had appointed a small committee to arrange for an ad hoc study committee to consider this widespread problem.

Eleven diverse national organizations with direct interests in crop production agriculture were represented on the Study Committee by designated leaders. They included commercial plant breeders, seed trade groups, crop commodity organizations, seed enforcement officials, farm cooperatives, general farm organizations, and seed certification. Specific commodities represented were cotton, soybeans, wheat and vegetable seeds. Two persons represented the PVP Advisory Board. A resource person from the PVP Office attended.

Section 113 of the PVP Act recognizes the right of a person to save seed produced from planting seed of a protected variety obtained, or descended from seed obtained, by authority of the owner of the variety and to use "such saved seed" in the production of a crop for use on the person's farm. It further recognizes the right "for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed (underline added) to other persons so engaged, for reproductive purposes", provided such sale is in accordance with State laws. The right to sell seed for reproductive purposes under this provision, originally intended to permit a farmer to provide seed to neighbors as a customary, community practice, has led to widespread abuse.

A general consensus prevailed among members of the Study-Committee on two points:

1. The PVP Act, by assuring developers of improved varieties exclusive rights to reproduce and sell them and thereby to realize returns on their research investment, is beneficial to U.S. agriculture as worldwide competition in agriculture continues to increase.
2. Farmers who purchase seed of protected varieties should be allowed to save seed from what they produce to use for planting on their own land they directly farm.

Experience since enactment of the PVP Act in 1970 has shown that most farmers offering for sale seed produced from land planted to protected varieties have not realized that their act is illegal. They have ceased when so informed. A few have made a practice of merchandising substantial quantities of such "seed" illegally, enough to affect the returns to the developer and owner of the protected variety. Lack of definition in the PVP Act or pertinent regulations that would set a quantity limit for "such saved seed" has been a problem in legal interpretations and, thus, in enforcement.

The Study Committee recommends that the following be added to the list of definitions in Section 180.1 of Regulations and Rules of Practice under the Plant Variety Protection Act:

"Such saved seed" as used in Section 113 shall mean an amount normally required, following customary operating practices, for the production of a crop of the protected variety on land farmed by the person saving seed.

Rather than going to Congress for a change in the PVP Act, the Committee believes that the first action should be to add the above definition to regulations. This should be followed by extensive educational programs carried out by the seed trade, seed certification agencies, the Cooperative Extension Service, seed enforcement agencies, and other agricultural organizations to inform all crop producers of purposes and provisions of the PVP Act. Emphasis should be given to the benefits that accrue to all producers in U.S. agriculture from having a continuing flow of improved varieties for use on their farms.

Consideration should be given to changes in the PVP Act only if the addition of the definition of "such saved seed" and a broad education program do not lead to elimination of the major abuses that are occurring.

April 1988

Roster of Study Committee appended.

**PLANT VARIETY PROTECTION  
FARMERS' EXEMPTION STUDY COMMITTEE  
MEMBERS**

**No.    Name and address**

---

1. Billy E. Caldwell, Head, Dept. of Crop Science, No. Car. State Univ., Raleigh, NC 27650
2. John C. Datt, Amer. Farm Bur. Fed., 600 Maryland Ave., SW, Suite 800, Washington, D.C. 20024
3. Donald G. Hanway, Prof. of Agronomy Emeritus, Univ. of Nebr., 6025 Madison Ave., Lincoln, NE 68507
4. Bill (William) Lovelady, Farmer representing National Cotton Council of America, Box 51, Tornillo, TX 79853
5. Foil McLaughlin, Exec. Vice Pres., Assoc. Official Seed Certifying Agencies, 3709 Hillsborough St., Raleigh, NC 27607
6. Larry W. Nees, Seed Admin., Dept. of Biochemistry, Purdue Univ., West Lafayette, IN 47907
7. Robert W. Pomig, Vice Pres. of Research, Northrup King Co, and Pres., Nat'l Council Commercial Plant Breeders, 7500 Olson Memorial Highway, Golden Valley, MN 55427
8. David Seehusen, Cenex/Land O'Lakes Ag Services representing Nat'l Council of Farm Cooperatives, 2827 Eighth Avenue South, Ft. Dodge, Iowa 50501

9. Virgil W. Smail, National Assoc. of Wheat Growers Found., 415 Second St., NE, Suite 300, Washington, D.C. 20002
10. David Stock, Producer representing the Amer. Soybean Assoc., Rte. 1, Box 112, Murdock, NE 68407
11. Paul C. Thomas, Senior Vice Pres., Petoseed Co., Inc., Rte. 4, Box 1255, Woodland, CA 95695
12. E. D. Weimortz, Pres., Cal/West Seeds representing the Amer. Seed Trade Assoc., P. O. Box 1428, Woodland, CA 95696-1428
13. Sidney B. Williams, Jr., Assoc. Patent Counsel, The Upjohn Co., 7000 Portage Road, Kalamazoo, MI 49001-0199



**FARMER EXEMPTION STUDY COMMITTEE**  
**For Plant Variety Protection Advisory Board**

- I. From Farmer Organizations
  - A. Representing wheat growers
 

Dr. Virgil Smail  
 National Association of Wheat Growers  
 Foundation  
 415 Second Street, N.E., Suite 300  
 Washington, D.C. 20002  
 (202) 547-7800
  - B. Representing soybean growers
 

Mr. David Stock  
 Route 1, Box 112  
 Murdock, Nebraska 68407  
 (402) 867-2441 - home  
                   -3771 - office
  - C. Designee of National Cotton Council of America
 

Mr. Bill (William) Lovelady  
 Cotton Producer  
 Box 51  
 Tornillo, Texas 79853  
 (915) 764-3967
  - D. Representing farmers in general
 

Mr. John Datt  
 American Farm Bureau Federation  
 600 Maryland Avenue, S.W. Suite 800  
 Washington, D.C. 20024  
 (202) 484-0055

- II. From public agricultural workers
  - A. Representing seed certification
 

Mr. Foil McLaughlin, Executive Vice  
 President  
 Association of Official Seed Certifying  
 Agencies  
 3709 Hillsborough Street  
 Raleigh, NC 27607  
 (919) 737-2851
  - B. Representing state seed enforcement officials
 

Mr. Mark Ringler  
 Seed Regulatory Supervisor  
 Illinois Dept. of Agriculture  
 8th & Sangamon Street  
 Springfield, IL 62705  
 (217) 782-3817
  - C. Representing the National Council of Farm  
 Cooperatives
 

Mr. David Seehusen  
 Cenex/Land O'Lakes Ag Services  
 2827 Eighth Avenue South  
 Ft. Dodge, Iowa 50501  
 (612) 451-5151
- III. From the seed industry
  - A. Representing the seed industry in general
 

Mr. Ed Weimortz  
 Cal/West Seeds  
 P. O. Box 1428  
 Woodland, CA 95696-1428  
 (916) 666-3331

B. Representing commercial plant breeders  
 Dr. Robert Romis, President  
 National Council of Commercial Plant  
 Breeders  
 Northrup King  
 7500 Olson Memorial Highway  
 Golden Valley, Minnesota 55427  
 (612) 593-7333

C. Representing vegetable seeds  
 Dr. Paul C. Thomas, Senior Vice  
 President  
 Petoseed Co., Inc.  
 Route 4, Box 1255  
 Woodland, California 95695  
 (916) 666-0931 office  
 -2817 home

IV. Providing legal counsel  
 Mr. Sidney B. Williams, Jr.,  
 Associate Patent Counsel  
 The Upjohn Company  
 Kalamazoo, Michigan 49001  
 (616) 385-7236

V. From the Plant Variety Protection Advisory Board  
 Dr. Billy E. Caldwell, Head  
 Department of Crop Science  
 North Carolina State University  
 Raleigh, North Carolina 27650  
 (919) 737-2647  
 Dr. Donald G. Hanway, Professor of  
 Agronomy Emeritus  
 6025 Madison Avenue  
 Lincoln, Nebraska  
 (402) 466-7135

#### Resource personnel from AMS, USDA

Mr. David Hallett, Deputy Director  
 Livestock and Seed Division  
 Agricultural Marketing Service, USDA  
 P. O. Box 96456  
 Washington, D.C. 20090-6456

Dr. Kenneth H. Evans, Commissioner  
 Plant Variety Protection Office  
 NAL Building, Rm. 500  
 Beltsville, MD 20705-2351

2/15/88

TO: Thomas M. Walsh, Assistant General Counsel  
Marketing Division, OGC

FROM: Paul M. Fuller, Director  
Livestock and Seed Division

SUBJECT: Defining the Plant Variety Protection  
"Farmer's Exemption" by Regulation

Numerous recent lawsuits are one evidence of the growing interest in proprietary rights for those who "invent" new plant varieties. While the seed industry is interested in all cases of infringement of varieties protected by Plant Variety Protection (PVP) certificates, a current area of particular focus is the crop exemption provision (known as the "farmer's exemption") under section 113 of the Plant Variety Protection Act (Act). This exemption was included in the Act so that a farmer could keep enough seed for himself and his neighbors. However, under this exemption as presently interpreted by some courts, a farmer can sell seed from land covering less than half of his total farm in up to three States.

The Plant Variety Protection Advisory Board (Board), at its meeting September 22, 1987, discussed the "farmer's exemption" and concluded that some farmer sales were in fact infringements and that these "serious abuses ... must be addressed promptly if the intent of Congress to encourage development of new varieties of plants is to be continued." The Board then selected three members to appoint a committee to study the farmer's exemption problem and recommend a solution.

The 3-member group appointed 13 study committee members representing 11 diverse national organizations from 5 different areas having vital interests in the seed industry: (1) the PVP Advisory Board, (2) farm organizations, (3) public agriculture workers, (4) the seed industry itself, and (5)

the legal and patent law segment. This 13-member study committee met in Chicago on March 8, 1988--with PVP Commissioner Kenneth Evans present as a resource person--and proposed that the following definition be added to the regulations:

"Such saved seed" as used in section 113 shall mean an amount normally required, following customary operating practices, for the production of a crop of the protected variety on land farmed by the person saving seed.

Assistant Secretary Gilles forwarded the farmer's exemption study committee report to the PVP Advisory Board members for their comments. In their responses to Dr. Gilles, a majority of Board members have approved the committee recommendations and supported clarifying the farmer's exemption by regulation. (One Board member questioned the proper procedure for implementing the recommendation, and four failed to respond at this time.)

Reaction to the study committee's recommendation of adding a definition of "Such saved seed" in the regulations to clarify the Act has indicated wide support. We believe clarification of the farmer's exemption in regulations is beneficial to the PVP program and to U.S. agriculture. Therefore, we agree with the study committee and the PVP Advisory Board that the suggested definition should be added by regulation, and we attach a docket proposing this amendment.

We request your concurrence with this proposed action to clarify the farmer's exemption by amending the regulations.

AMS:L&SD:PMFuller:KHEvans:jmb:08/26/88:344-2518



Mary Knudson and LeRoy Hansen  
**Intellectual Property Rights and the Private Seed Industry**  
 United States Department of Agriculture  
 Economic Research Service  
*Agricultural Economic Report No. 654*

\* \* \*

A second law, the Plant-Variety Protection Act (PVPA), was passed in 1970. By this date, Congress had become convinced that sexually reproducing varieties could breed true. This law provided patent-like protection for sexually reproducing varieties, excluding celery, tomatoes, bell peppers, cucumbers, carrots, and okra. Several soup-vegetable species were omitted because of objections raised by canners and freezers (Ruttan, 1982, p. 195). These objections arose from the supposition that costs as well as prices would escalate if these vegetables were protected. To gain a Plant-Variety Protection Certificate (PVPC), granted by the U.S. Department of Agriculture (USDA), a breeder must prove that the variety is distinct, uniform, and stable. Protection begins when the breeder applies for a certificate (as opposed to when it is issued) and lasts for 17 years. However, in some cases, the Secretary of Agriculture can declare a particular variety open for public use, such as during a drought or a devastating disease in a particular crop, so as to guarantee an adequate supply of food and fiber.

The PVPA contains two additional exemptions. The first exemption is that farmers whose primary occupation is growing crops can use their harvested seed for planting and selling (crop exemption). This exemption has two weaknesses. First, 49 percent of a harvest can be sold as seed. In the case of Asgrow Seed Co. v. Kunkle Seed Co., Inc., et al., a district court ruled, and a Court of Appeals for the Federal circuit sustained, that the defendant could sell

seed from a protected soybean variety because less than 50 percent of his income came from such sales. Yet, this defendant had already sold 1.42 million pounds of this seed variety and appeared to be increasing his farm production only to increase his seed sales (U.S. Congress, OTA, 1989, p. 75). Farmers can also trade such seed among themselves for services or for other seed. The second exemption is that protected varieties can be used in research programs.

The PVPA was amended in 1980, but not without heated debate concerning increasing industry concentration and higher seed prices (Doyle, 1985; Kloppenburg, 1988). The amendment extended the time of protection from 17 to 18 years to be consistent with the Union for the Protection of New Varieties of Plants (UPOV), and the protection now included the six vegetable crops.<sup>6</sup>

\* \* \*

<sup>6</sup> UPOV provides an international framework for developing plant breeders' rights. The UPOV recommends protection be given for 15 or 18 years, depending on the crop. It was created in 1961 by Belgium, Denmark, France, the Federal Republic of Germany, Israel, Italy, the Netherlands, South Africa, Sweden, Switzerland, and the United Kingdom. The United States became a member in 1978 (Cooper, 1982).

FILED  
 SIOUX CITY OFF. WESTERN DIV.  
 NORTHERN DISTRICT OF IOWA  
 1:59 P.M.  
 JAN 24 1991

William J. (illegible) Clerk  
 By /s/ J Hart  
 Deputy

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF IOWA  
 AT SIOUX CITY

THE ASGROW SEED )  
 COMPANY, )  
 Plaintiff, )

v. )

DENNIS WINTERBOER )  
 AND BECKY WINTERBOER, )  
 d/b/a DEEBEE'S, )  
 Defendants. )

CASE NO.  
 C91-4013

COMPLAINT FOR PRELIMINARY AND  
 PERMANENT INJUNCTION AND DAMAGES

Comes now the plaintiff, The Asgrow Seed Company (hereinafter referred to as "Asgrow"), and for its cause of action against the defendants states as follows:

Parties

1. At all times relevant hereto, Asgrow was and is a corporation organized under the laws of the State of Delaware with its principal place of business in the State of Michigan.

2. At all times relevant hereto, defendants, Dennis Winterboer and Becky Winterboer, were and are residents of Iowa, doing business as DeeBee's in Milford, Iowa.

Jurisdiction

3. This is a civil action for infringement of the Plant Variety Protection Act arising under Title 7, United States Code, Section 2541, et seq. This Court has jurisdiction by reason of Title 28, United States Code, Section 1331.

Count I

4. On September 24, 1982, the United States of America, under the Seal of the Plant Variety Protection Office, issued Plant Variety Certificate No. 8100082 to Asgrow for a novel variety of soybean named A1937. During the term of the Plant Variety Protection Certificate, Asgrow has the right to exclude the defendants, their employees and agents, and all others, from selling the variety, offering it for sale, reproducing it, importing it, exporting it, or using it in producing a hybrid or different variety therefrom, to the extent provided by the Act. A copy of said Certificate is attached hereto and made a part hereof as Exhibit A.

5. On June 30, 1987, the United States of America, under the Seal of the Plant Variety Protection Office, issued Plant Variety Certificate No. 8700079 to Asgrow for a novel variety of soybean named A2234. During the term of the Plant Variety Protection Certificate, Asgrow has the right to exclude the defendants, its employees and agents, and all others, from selling the



variety, offering it for sale, reproducing it, importing it, exporting it, or using it in producing a hybrid or different variety therefrom, to the extent provided by the Act. A copy of said Certificate is attached hereto and made a part hereof as Exhibit B.

6. Upon information and belief, Asgrow alleges that at various times since September 24, 1982, the Defendants have sold, offered for sale, exposed for sale, delivered and transferred Asgrow's novel variety A1937 in violation of Title 7, United States Code, Section 2541(1).

7. Upon information and belief, Asgrow alleges that at various times since September 24, 1982, the Defendants dispensed Asgrow's novel variety A1937 in a form which can be propagated, without the notice as to it being a protected variety under which it was received, in violation of Title 7, United States Code, Section 2541(6).

8. Upon information and belief, Asgrow alleges that at various times since September 24, 1982, the Defendants offered, sold, transferred, and used Asgrow's novel variety A1937 in various manners not authorized by Asgrow and in violation of Title 7, United States Code, Section 2541.

9. Upon information and belief, Asgrow alleges that at various times since June 30, 1987, the Defendants have sold, offered for sale, exposed for sale, delivered and transferred Asgrow's novel variety A2234 in violation of Title 7, United States Code, Section 2541(1).

10. Upon information and belief, Asgrow alleges that at various times since June 30, 1987, the Defendants dispensed Asgrow's novel variety A2234 in a form which can be propagated, without the notice as to it being a

protected variety under which it was received, in violation of Title 7, United States Code, Section 2541(6).

11. Upon information and belief, Asgrow alleges that at various times since June 30, 1987, the Defendants offered, sold, transferred, and used Asgrow's novel variety A2234 in various manners not authorized by Asgrow and in violation of Title 7, United States Code, Section 2541.

12. The acts of infringement set forth herein have threatened and continue to threaten irreparable harm to Asgrow, for which it has no adequate remedy.

WHEREFORE, Asgrow prays that the Court temporarily and permanently enjoin the Defendants and their agents and employees from:

a. Selling, offering or exposing for sale, delivering, shipping, consigning, exchanging, soliciting an offer to buy, or otherwise transferring title to or possession of any of Asgrow's novel varieties for which Plant Variety Protection Certificates have been issued to Asgrow or applied for by Asgrow, except with the permission of Asgrow;

b. Dispensing Asgrow's novel varieties to another, in a form which can be propagated, without the notice as to it being a protected variety under which it was received; and

c. Performing, or attempting to perform, without authority, any act which is an infringement of the Plant Variety Protection Act.



Count II

13. Asgrow incorporates by reference, as fully set forth herein, paragraphs 1 through 11.

14. As a result of the acts of the Defendants in using, selling, offering, exposing for sale, delivering and transferring title to Asgrow's novel varieties, and otherwise violating Title 7, United States Code, Section 2541, Asgrow has been damaged.

15. Pursuant to Title 7, United States Code, Section 2564(b), the Court is authorized to increase Asgrow's damages up to three times the amount determined.

16. As a result of the Defendants' violation of Asgrow's rights under the Plant Variety Protection Act, Asgrow is incurring, and will continue to incur, attorneys' fees and costs in this action. This case is an exceptional case, requiring an award of reasonable attorneys' fees.

WHEREFORE, Plaintiff prays:

- a. That the Court award judgment against the Defendant in an amount which will justly and adequately compensate Asgrow for the damages it has suffered;
- b. That said damages be trebled;
- c. That the Court award Asgrow reasonable attorneys' fees and costs; and
- d. For all other relief which the Court deems just and proper in the premises including prejudgment interest.

Respectfully submitted,

/s/ Lawrence C. Maxwell  
Lawrence C. Maxwell  
/s/ Mary Ellen Morris  
Mary Ellen Morris  
Trabue, Sturdivant & Dewitt  
25th Floor  
Nashville City Center  
511 Union Street  
Nashville, TN 37219-1738  
(615) 244-9270

/s/ James C. Fifield  
James C. Fifield  
Duncan, Jones, Riley & Finley, P.C.  
Fourth Floor, Equitable Building  
Des Moines, Iowa 50309  
(515) 288-0145

Bruce Stein  
The Upjohn Company  
7000 Portage Road  
Kalamazoo, MI 49001  
(616) 385-7107

Attorneys for Plaintiff,  
The Asgrow Seed Company

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA -  
WESTERN DIVISION

-----  
THE ASGROW SEED COMPANY,  
PLAINTIFF,

VS

DENNIS WINTERBOER AND BECKY  
WINTERBOER, d/b/a DEEBEE'S,  
DEFENDANTS.  
-----

:  
:  
:  
: CASE NO.  
: C91-4013

ANSWER

Come now defendants and in answer state:

1. Admit paragraph 1.

2. Admit paragraph 2 and further state that DeeBee's is a trade name for horse feed sold by a family farm corporation owned by Dennis Winterboer and Becky Winterboer. The name of the corporation is D-Double-U Corporation.

3. Admit paragraph 3.

COUNT I

4. Deny paragraph 4 and further state that defendants have a right to save and sell seed under the farmer exemption, 7 U.S.C. §2543.

5. Deny paragraph 5 and further state that defendants have a right to save and sell seed under the farmer exemption, 7 U.S.C. §2543.

6. Admit that defendants have offered for sale bean seed, but deny it is in violation of Title 7, U.S.C. §2541(1) for reason those sales have been within the exemption of 7 U.S.C. §2543.

7. Admit that defendants have dispensed seed, but deny it is in violation of Title 7, U.S.C. §2541(6) for reason that it is within the exemption of 7 U.S.C. §2543.

8. Admit that defendants have offered for sale bean seed, but deny it is in violation of Title 7, U.S.C. §2541(1) for reason those sales have been within the exemption of 7 U.S.C. §2543.

9. Admit that defendants have offered for sale bean seed, but deny it is in violation of Title 7, U.S.C. §2541(1) for reason those sales have been within the exemption of 7 U.S.C. §2543.

10. Admit that defendants have dispensed seed, but deny it is in violation of Title 7, U.S.C. §2541(6) for reason that it is within the exemption of 7 U.S.C. §2543.

11. Admit that defendants have offered for sale bean seed, but deny it is in violation of Title 7, U.S.C. §2541 for reason those sales have been within the exemption of 7 U.S.C. §2543.

12. Deny paragraph 12.

13. By way of affirmative defense defendants state that sales of seed by defendants have been within the farmer-

to-farmer direct sale exemption provided for in 7 U.S.C. §2543.

WHEREFORE, defendants request the court dismiss the complaint for temporary and permanent injunction as to these acts of defendants which are within the farmer-to-farmer direct sale exemption of 7 U.S.C. §2543.

### COUNT II

13. Defendants incorporate by reference as though fully set forth herein, their answers to paragraphs 1 through 11.

14. Deny paragraph 14.

15. Deny paragraph 15.

16. Deny paragraph 16.

17. Defendants affirmatively state that any and all sales by defendants are within the farmer-to-farmer direct sale exemption provided for in 7 U.S.C. §2543.

WHEREFORE, defendants request the court dismiss plaintiff's action, with costs taxed to plaintiff, and that defendants be awarded reasonable attorney fees under 7 U.S.C. §2565 as the prevailing party, which fees were incurred by defendants being required to defend a matter which has not been adequately investigated by plaintiffs prior to commencing the action.

/s/ Stephen F. Avery  
Stephen F. Avery  
CORNWALL, AVERY, BJORNSTAD & SCOTT  
407 Grand Avenue, P. O. Box 3046  
Spencer, IA 51301  
(712) 262-1630

Attorney for Defendants

Copy to:

James C. Fifield  
4th Floor Equitable building  
Des Moines, IA 50309

Lawrence C. Maxwell  
Mary Ellen Morris  
25th Floor Nashville City Center  
511 Union Street  
Nashville, TN 37219-1738

Bruce Stein  
The Upjohn Company  
7000 Portage Road  
Kalamazoo, MI 49001

### CERTIFICATE OF SERVICE

The undersigned certifies that on 2/12/1991 the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, postage prepaid in envelope addressed to each of the attorneys of record herein at their respective addresses disclosed in the pleadings.

/s/ Stephen F. Avery



9

Supreme Court, U.S.  
FILED

JUN 10 1994

No. 92-2038

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

ASGROW SEED COMPANY,  
*Petitioner,*

v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

**BRIEF FOR THE PETITIONER**

*Of Counsel:*

BRUCE STEIN  
SIDNEY B. WILLIAMS, JR.  
THE UPJOHN COMPANY  
7000 Portage Road  
Kalamazoo, Michigan 49001  
(616) 323-4000  
LAWRENCE C. MAXWELL  
MARY ELLEN MORRIS  
TRABUE, STURDIVANT & DEWITT  
511 Union Street  
Nashville, Tennessee 37219  
(615) 244-9270

RICHARD L. STANLEY  
*Counsel of Record*  
JOHN F. LYNCH  
ARNOLD, WHITE & DURKEE  
750 Bering Drive  
Suite 400  
Houston, Texas 77057  
(713) 787-1400  
*Counsel for Petitioner*  
*Asgrow Seed Company*

58 pp

### QUESTIONS PRESENTED

The Plant Variety Protection Act, 7 U.S.C. §§ 2321-2581, provides legal protection for novel varieties of sexually reproduced plants. 7 U.S.C. § 2541 specifies the acts of infringement, including selling the novel variety. The district court held that the exemption from infringement in 7 U.S.C. § 2543 allows a qualified person to save seed of a protected variety from a crop produced by that person and to sell no more than the amount of seed that would have been needed to produce another crop on that person's farm. The Court of Appeals for the Federal Circuit reversed.

The questions presented are:

(1) Whether the Federal Circuit erred as a matter of law in holding that 7 U.S.C. § 2543 permits up to half of a farmer's crop produced from a protected novel plant variety to be sold as seed in competition with the owner of the novel variety?

(2) Whether the seed sales authorized by 7 U.S.C. § 2543 remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the purchaser that the seed being sold is a protected novel variety?

## PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the district court and in the Federal Circuit are listed in the caption of the case. Pursuant to Supreme Court Rule 29.1, Asgrow Seed Company ("Asgrow") states that it is a wholly-owned subsidiary of The Upjohn Company. Asgrow has no other publicly-owned parents, subsidiaries, or affiliates.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDING .....	ii
TABLE OF AUTHORITIES .....	v
OPINIONS BELOW .....	1
JURISDICTION .....	2
STATUTE INVOLVED .....	2
STATEMENT OF THE CASE .....	2
A. Overview Of The Plant Variety Protection Act..	2
B. General Factual Background .....	5
C. The Proceedings Below .....	7
SUMMARY OF ARGUMENT .....	12
ARGUMENT .....	16
I. THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO THE STATUTORY LANGUAGE, THE EXPRESS INTENT OF CONGRESS, AND THE STATED PURPOSES FOR THE ACT .....	16
A. By Excepting Action That Might Infringe Under Section 2541(3) From The Exemption Of Section 2543, Congress Limited The Amount Of A Novel Variety That Could Be Sold As Seed Under Section 2543 .....	17
1. The Federal Circuit Misconstrued The Introductory Clause Of Section 2543 And Its Incorporation Of Section 2541(3) .....	19



## TABLE OF CONTENTS—Continued

	Page
2. The Only Portion Of A Crop Produced From Authorized Seed That Can Be Sold As Seed Under Section 2543 Is The Amount Needed To Produce Another Crop On The Farmer's Own Farm .....	21
B. After Limiting The Amount Of Saved Seed, Congress Allowed Sales Of "Such Saved Seed" To Take Place Between Farmers Without Violating Section 2541(3) .....	24
C. The Legislative History Confirms That The Right To Sell "Such Saved Seed" Is Limited To The Amount Needed For Producing A Crop On The Farm .....	27
II. THE NOTICE REQUIREMENTS OF SECTION 2541(6) MUST APPLY TO ANY SALES MADE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 2543 .....	28
A. Section 2543 Only Provides A Limited Exemption From Infringement For Certain Sales Of Protected Seed That Would Otherwise Infringe Under Subsections (1) And (3) Of Section 2541 .....	32
B. The Policies Supporting Giving Notice To All Recipients Of PVPA-Protected Seed Remain Constant, Regardless Of The Type Of Transaction Involved .....	37
III. THE PURPOSES AND POLICIES UNDERLYING THE PVPA CAN ONLY BE PRESERVED BY RESTORING CONGRESS' INTERPRETATION ON BOTH STATUTORY ISSUES PRESENTED .....	40
CONCLUSION .....	46

## TABLE OF AUTHORITIES

Cases	Page
<i>A.H. Phillips, Inc. v. Walling</i> , 324 U.S. 490 (1945) ..	17, 32
<i>American Medical Sys. v. Medical Eng. Corp.</i> , 6 F.3d 1523 (Fed. Cir.), cert. denied, 62 U.S.L.W. 3722 (1994) .....	29
<i>Aronson v. Quick Point Pencil Co.</i> , 440 U.S. 257 (1979) .....	31
<i>City of Canton, Ohio v. Harris</i> , 489 U.S. 378 (1989) .....	31
<i>Commissioner v. Clark</i> , 489 U.S. 726 (1989) .....	32
<i>Connecticut National Bank v. Germain</i> , — U.S. —, 112 S.Ct. 1146 (1992) .....	26
<i>Daimler Mfg. Co. v. Conklin</i> , 170 F. 70 (2d Cir. 1909), cert. denied, 216 U.S. 621 (1910) .....	34
<i>Diamond v. Chakrabarty</i> , 447 U.S. 303 (1981) .....	3
<i>Fedorenko v. United States</i> , 449 U.S. 490 (1981) ..	37
<i>Hallstrom v. Tillamook County</i> , 493 U.S. 20 (1989) .....	37
<i>Holy Trinity Church v. United States</i> , 143 U.S. 457 (1892) .....	17
<i>In re Bergy</i> , 596 F.2d 952 (C.C.P.A. 1979), aff'd, <i>Diamond v. Chakrabarty</i> , 447 U.S. 303 (1980) ..	3
<i>In re Trans Alaska Pipeline Rate Cases</i> , 436 U.S. 631 (1978) .....	26
<i>John Hancock Mut. Life Ins. Co. v. Harris Trust &amp; Sav. Bank</i> , — U.S. —, 114 S.Ct. 517 (1993) .....	32
<i>Landreth Timber Co. v. Landreth</i> , 471 U.S. 681 (1985) .....	19
<i>Oates v. First National Bank of Montgomery</i> , 100 U.S. (10 Otto) 239 (1879) .....	17
<i>Palmer v. United States</i> , 340 F.2d 48 (5th Cir. 1964), cert. denied, 382 U.S. 903 (1965) .....	33
<i>Perrin v. United States</i> , 444 U.S. 37 (1979) .....	20
<i>Public Citizen v. United States Dept. of Justice</i> , 491 U.S. 440 (1989) .....	17
<i>Public Varieties of Mississippi, Inc. v. Sun Valley Seed Co.</i> , 734 F. Supp. 250 (N.D. Miss. 1990) .....	3
<i>Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.</i> , 497 F.2d 203 (9th Cir.), cert. denied, 419 U.S. 999 (1974) .....	20

## TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Lexington Mill &amp; Elevator Co.</i> , 232 U.S. 399 (1914) .....	25
<i>United States v. Menasche</i> , 348 U.S. 528 (1955) .....	25
<i>United States v. Nordic Village, Inc.</i> , — U.S. —, 112 S.Ct. 1011 (1992) .....	25
<i>Whittemore v. Cutler</i> , 29 F. Cas. 1120 (No. 17,600) (C.C.D. Mass. 1813) .....	34
<i>Federal Statutes</i>	
7 U.S.C. § 2321 .....	43
7 U.S.C. §§ 2321-2581 .....	2
7 U.S.C. § 2401 (a) .....	3
7 U.S.C. § 2402 .....	3
7 U.S.C. §§ 2421-27 .....	3
7 U.S.C. § 2483 (a) .....	4
7 U.S.C. § 2483 (b) .....	3
7 U.S.C. § 2541 .....	<i>passim</i>
7 U.S.C. § 2541 (1) .....	<i>passim</i>
7 U.S.C. § 2541 (2) .....	9, 12, 19, 29, 33, 34, 36
7 U.S.C. § 2541 (3) .....	<i>passim</i>
7 U.S.C. § 2541 (4) .....	9, 12, 19, 20, 29, 34, 36
7 U.S.C. § 2541 (5) .....	9, 12, 19, 29, 33, 36
7 U.S.C. § 2541 (6) .....	<i>passim</i>
7 U.S.C. § 2541 (7) .....	9, 12, 19, 29, 33, 36
7 U.S.C. § 2541 (8) .....	9, 12, 19, 29, 33, 34, 36
7 U.S.C. § 2543 .....	<i>passim</i>
7 U.S.C. § 2561 .....	3
7 U.S.C. § 2567 .....	15, 35, 37-40
7 U.S.C. § 2581 .....	16
28 U.S.C. § 1254 (1) .....	2
28 U.S.C. § 1292 (a) (1) .....	2
28 U.S.C. § 1292 (c) (1) .....	2
28 U.S.C. § 1338 (a) .....	2
35 U.S.C. § 154 .....	34
35 U.S.C. §§ 161-164 .....	3
35 U.S.C. § 271 (a) .....	34
35 U.S.C. § 287 .....	29

## TABLE OF AUTHORITIES—Continued

<i>State Statutes</i>	Page
Ariz. Rev. Stat. Ann. § 3-237 (6) (1993) .....	31
Colo. Rev. Stat. § 35-27-113 (1) (g-h) (1993) .....	31
Iowa Code, § 199 (1989) .....	30
<i>International Agreements</i>	
International Convention for the Protection of New Varieties of Plants, March 19, 1991 .....	42
Art. 14 (1) .....	42, 45
<i>Other</i>	
D. Chisum, Patents, § 1.05 [2] (1993) .....	3, 44
H.R. Rep. No. 1605, 91st Cong., 2d Sess. (1970) .....	3, 28, 41
H.R. Rep. No. 2927, 103d Cong., 1st Sess. (1983) .....	42, 43
H.R. Rep. No. 13631, 91st Cong., 1st Sess. (1969) .....	27
J. Kraus, <i>Case Control in the Plant Variety Pro- tection Act: Eradicating Asgrow</i> , 76 J. Pat. & Trademark Off. Soc'y 291 (April 1994) .....	44
Plant Variety Protection Act: Hearing on S. 3070 Before the Subcommittee on Agricultural Re- search and General Legislation of the Committee on Agriculture and Forestry, 91st Cong., 2d Sess. (June 11, 1970) .....	2
S. Rep. No. 1138, 91st Cong., 2d Sess. (1970) .....	3, 28
S. Rep. No. 1406, 103d Cong., 2d Sess. (1994) .....	42, 43
S. Rep. No. 3070, 91st Cong., 1st Sess. (1969) .....	27
Webster's New World Dictionary (3d col. ed. 1988) .....	21

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

---

No. 92-2038

---

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

---

**BRIEF FOR THE PETITIONER**

---

**OPINIONS BELOW**

The opinion of the Federal Circuit is reported at 982 F.2d 486 and is reprinted in Pet. App. 1a-14a. The opinion of the district court is reported at 795 F. Supp. 915 and is reprinted at Pet. App. 15a-26a.

On March 25, 1993, the Federal Circuit simultaneously denied Asgrow's petition for rehearing and declined Asgrow's combined suggestion for rehearing in banc. Pet. App. 27a-28a. Judge Newman filed a separate opinion dissenting from the denial of rehearing in banc, and Judge Rader filed an additional opinion concurring in the denial of rehearing in banc. The two opinions accompanying the denial of rehearing in banc are reported at 989 F.2d 478 and are reprinted in Pet. App. 28a-38a.



## JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 1338(a). The jurisdiction of the Federal Circuit was invoked pursuant to 28 U.S.C. § 1292(a)(1) and 28 U.S.C. § 1292(c)(1). The Federal Circuit denied Asgrow's timely petition for rehearing on March 25, 1993. Pet. App. 27a-28a. The mandate of the Federal Circuit was stayed pending final disposition by this Court of the issues raised by the present writ. Pet. App. 39a. The Petition for Writ of Certiorari was filed on June 23, 1993 and granted on April 18, 1994. The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

The pertinent statutory provision at issue is the "Right To Save Seed" set forth in the first sentence of 7 U.S.C. § 2543. The full text of 7 U.S.C. § 2543 has been reproduced in the Appendix attached to this brief and at Pet. App. 41a. In light of the relationship between section 2543 and the infringement provisions in 7 U.S.C. § 2541, the full text of 7 U.S.C. § 2541 is also set forth in the Appendix to this brief and at Pet. App. 40a-41a.

## STATEMENT OF THE CASE

### A. Overview Of The Plant Variety Protection Act

The Plant Variety Protection Act ("PVPA" or "Act"), 7 U.S.C. §§ 2321-2581, was established "to encourage the development of novel varieties of sexually reproduced plants and to make them available to the public, providing protection available to those who breed, develop, or discover them, and thereby promoting progress in agriculture in the public interest."<sup>1</sup> Sexually-reproduced plants in-

<sup>1</sup> See, e.g., Plant Variety Protection Act: Hearing on S. 3070 Before the Subcommittee on Agricultural Research and General Legislation of the Committee on Agriculture and Forestry, 91st Cong., 2d Sess. (June 11, 1970) (preamble).

clude many economically important crops that comprise a basic and indispensable segment of American agriculture, such as soybeans, wheat, cotton, barley, oats, rice, tomatoes, celery, and carrots.<sup>2</sup> In particular, the PVPA was designed to promote research and development by the private sector. See H.R. Rep. No. 1605, 91st Cong., 2d Sess. 1 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 1 (1970).

The PVPA provides "patent-like" protection to the breeder or developer of a new plant variety through plant variety protection certificates issued by the Plant Variety Protection Office ("PVPO") within the United States Department of Agriculture, 7 U.S.C. §§ 2402; 2421-27, and through enforcement actions in U.S. district courts.<sup>3</sup> 7 U.S.C. § 2561. To be certified under the PVPA, a novel variety must have (1) "distinctness" in at least one identifiable characteristic from all prior known varieties in public knowledge, (2) "uniformity" in the sense that any variations are describable, predictable and commercially acceptable, and (3) "stability" so the variety, when sexually multiplied, will remain unchanged with regard to its essential and distinctive characteristics with a reasonable degree of reliability. 7 U.S.C. § 2401(a). The term of protection under the Act is 18 years. 7 U.S.C. § 2483(b).

A valid PVPA certificate entitles the owner to the exclusive right during the term of plant variety protection to "exclude others from selling the variety, or offering it for

<sup>2</sup> Asexually reproduced plants, such as those propagated by grafting or budding, have been legally protected since 1930 by Chapter 15 of the Patent Act, 35 U.S.C. §§ 161-164. See *Diamond v. Chakrabarty*, 447 U.S. 303, 313 (1980). A more extensive discussion of the history leading to the enactment of the PVPA is provided in the Brief Amicus Curiae Of The American Seed Trade Association In Support Of Petitioner.

<sup>3</sup> See, e.g., *In re Bergy*, 596 F.2d 952, 984 (C.C.P.A. 1979), *aff'd*, *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); *Public Varieties of Mississippi, Inc. v. Sun Valley Seed Co.*, 734 F. Supp. 250, 251 & n.4 (N.D. Miss. 1990); D. Chisum, *Patents*, § 1.05[2] (1993).

sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom, to the extent provided by this chapter." 7 U.S.C. § 2483(a). Among the acts which infringe an owner's rights if performed without authorization are the following (listed by corresponding subsection of 7 U.S.C. § 2541): (1) "sell[ing] the novel variety, or offer[ing] it or expos[ing] it for sale, . . . or any other transfer of title or possession of it;" (3) "sexually multiply[ing] the novel variety as a step in marketing (for growing purposes) the variety;" or (6) "dispens[ing] the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received." Appendix; Pet. App. 40a.

In 7 U.S.C. § 2543, Congress listed limited exemptions from infringement for certain sales of a PVPA-protected novel variety. Section 2543 is entitled "Right to save seed; crop exemption." Paralleling that title, two distinct entitlements are set forth in the section. The first sentence of section 2543 constitutes what Congress described as a person's "right to save seed" and grants a limited right to sell "such saved seed" under specified conditions. The second sentence contains the distinct "crop exemption" which exempts from infringement any bona fide sales for *other than reproductive purposes*, made in channels usual for such other purposes, of seed produced on a farm from properly-obtained PVPA seed.<sup>4</sup>

The small portion of the Winterboers' crop of Asgrow PVPA-protected soybeans that they sold for non-reproductive purposes is not the subject of this case. As

<sup>4</sup> Despite being part of the same statutory section, the legislative history confirms that the "Right to save seed" and the "crop exemption" are separate and distinct. See *infra* section I.C. However, the Federal Circuit erroneously labelled the entirety of 7 U.S.C. § 2543 as "the crop exemption" and used that incorrect designation throughout its opinion. See, e.g., Pet. App. 5a.

a result, the "crop exemption" in the second sentence of section 2543 is not directly applicable to the outcome of this case. Instead, the two legal questions presented here concern the proper statutory interpretation to be given the "right to save seed" in the first sentence of section 2543: (1) how much PVPA-protected seed can be sold under the terms of that exemption and (2) whether seed sold under authority of the exemption in the first sentence of section 2543 must be accompanied by the notice of protected variety status otherwise required by section 2541(6).

### B. General Factual Background

Prior to the passage of the PVPA, what little research was done in the United States to develop self-pollinated plants was confined to the public sector because private investment was not economically justified. The development of new plant varieties requires a substantial investment of expertise, time, capital, land, and facilities that is most certainly beyond the resources of an individual farmer. Over a period of years, a plant breeder must undertake a myriad of research tasks and experiments with respect to each group of new plant populations isolated for study in the hope that a new commercially viable variety displaying advantageous yield, maturity, and/or disease-resistance traits will eventually be achieved. For each new variety that is eventually introduced to the public, many thousands of others have been isolated, studied, tested, and rejected.

Since Congress enacted the PVPA in 1970, the private development of novel plant varieties has had a profound effect on the productivity and global competitiveness of American agribusiness. Encouraged by the passage of the PVPA that they would be able to recoup the significant research and development costs, private seed companies invested heavily in new research programs to discover and develop novel seed varieties promising higher yields and crops more resistant to disease and adverse



environmental conditions. The PVPA prompted a boom in the availability of such novel varieties, contributing to a surge in the productivity of American agriculture and strengthening the position of the American farmer in the international marketplace. Unfortunately, the market success of the PVPA varieties led to abuses.

Sexually-reproduced plants produce crops yielding many multiples of the same seed that can then be used to produce future crops of plants with nearly identical characteristics to the original crop. For varieties such as tomatoes, lettuce, and celery, the seed of the sexually-multiplied plant is distinct from the primary value of the crop. In such cases, the seed of such varieties often can only be retained by sacrificing the crop (for instance, by letting a tomato "go to seed"). For other varieties such as cotton, both the seed and the crop (the cotton itself) can be retained from the same harvest. For other varieties such as wheat and soybeans, the primary value of the crop is the seed itself, which is the merchantable item whether later used for reproductive or for nonreproductive purposes. However, because such plants are self-generating, once a farmer obtains the seed of a PVPA-protected novel variety, that farmer can continue to grow successive crops of the same novel variety, and obtain the same beneficial results, without needing to purchase any additional seed from the seed company.

A farmer's crop will be used either for reproductive (seed) purposes or for non-reproductive (grain or feed) purposes. If a particular variety is disease-resistant and/or high-yielding, its seed will have great commercial value when used for reproductive purposes. The soybean varieties at issue here require approximately one bushel of soybeans when used as seed to plant an acre of land, and each bushel planted can produce yields of approximately 45 bushels of the same soybeans. Thus, for each acre planted, a farmer will easily be able to save enough soybeans as seed to replace the bushel that was originally

planted, and still have up to 44 (or more) bushels of soybeans to use or sell for other purposes. A soybean farmer will usually sell all or most of his crop to a grain elevator or processor, where the soybeans will be processed for various end uses. The farmer can also elect to have a portion of the soybean crop cleaned and stored for future use as seed.

Because soybeans cleaned for future use as seed are often stored in brown paper bags, such seed is commonly referred to as "brown bag" seed. Where the bagged seed is a PVPA-protected variety, a farmer will be able to sell "brown bag" PVPA seed at a much lower price than the certificate owner because the farmer does not have to recoup the owner's research, development, conditioning, production, and marketing costs.<sup>5</sup> Thus, because a farmer's crop of a novel variety commands a higher price (and thus produces a higher profit for the farmer) when it is sold as seed than when it is sold as grain or feed, a farmer will be motivated to sell as much of his crop to others for use as seed as possible, subject only to the limits imposed by market conditions, by his own farm needs, or by law.

### C. The Proceedings Below

Asgrow is the assignee of the Certificates of Plant Variety Protection covering the two PVPA-protected soybean varieties at issue in this case. These varieties are marketed by Asgrow under the designations A1937 and A2234. Respondents Denny and Becky Winterboer are farmers who grow primarily corn and soybeans on a farm of about 800 acres in Clay County, Iowa. When viewed collectively, a majority of all crops grown on the Winter-

<sup>5</sup> For example, in 1990, the Winterboers sold their "brown bag" Asgrow soybean seed at an average price of \$8.70 per bushel. In contrast, Asgrow's sales agents charged between \$16.20 and \$16.80 for each bushel of Asgrow seed.



boers' farm was used or sold for nonreproductive purposes. However, nearly all of the Winterboers' crop of Asgrow's PVPA-protected soybeans was sold by them as "brown bag" seed, using the designations "1938" and "2235," respectively.

In 1990, the Winterboers used PVPA-protected soybean seed purchased from Asgrow to produce a crop of 12,037 bushels of Asgrow soybeans on 265 acres of their farm. The Winterboers then sold 10,529 bushels of that crop (over 87%) to others for use as seed, which was the maximum portion saleable as seed after broken or damaged soybeans had been removed. Each year since 1986, the Winterboers have sold their entire saleable Asgrow soybean crop to others for use as seed, and have purchased new seed directly from Asgrow to satisfy their own planting needs.

On January 24, 1991, Asgrow filed suit against the Winterboers in the United States District Court for the Northern District of Iowa, alleging infringement under 7 U.S.C. § 2541(1) for selling or offering to sell Asgrow's PVPA-protected novel soybean varieties, under 7 U.S.C. § 2541(3) for sexually multiplying Asgrow's novel varieties as a step in marketing those varieties for growing purposes, and under 7 U.S.C. § 2541(6) for dispensing Asgrow's novel varieties to another in a form which could be propagated without providing notice that the seeds were of a protected variety. The Winterboers defended by asserting that their activities were within the statutory exemption from infringement provided by 7 U.S.C. § 2543.

After both parties moved for summary judgment on liability, the district court granted Asgrow's motion and denied the Winterboers' motion. *See* Pet. App. 15a-24a. The district court held that "[s]aved seed shall be limited to the amount of PVPA-protected seed reasonably needed by the farmer who grew it to plant the number of acres of the protected variety, or its progeny, he or she needs

in the upcoming crop year." Pet. App. 24a. The district court also concluded that a farmer selling seed in accordance with 7 U.S.C. § 2543 was required to give notice that the seed sold was a protected variety, as required by 7 U.S.C. § 2541(6). Pet. App. 17a n.2. Holding that the Winterboers were in violation of 7 U.S.C. § 2541(1) and (3), the district court enjoined them from "selling any seed, except for saved seed, to other farmers, and/or engaging in any form of brown bagging." Pet. App. 24a.<sup>6</sup>

The Federal Circuit reversed, holding that 7 U.S.C. § 2543 did not contain any language that quantitatively limits a farmer's sale of PVPA seed to the amount of seed necessary to grow another crop. *See* Pet. App. A. Instead, the Federal Circuit held that section 2543 permitted up to half of every crop produced by any person from seed obtained by authority of the PVPA certificate owner to be sold as seed in competition with the certificate owner, as long as at least fifty percent of the seller's crop of that specific PVPA-protected variety is sold for nonreproductive purposes. Pet. App. 7a-13a.

The Federal Circuit interpreted the introductory clause to the first sentence of section 2543 to mean that a farmer within the terms of section 2543 remains subject to infringement liability under subsections (3) and (4) of 7 U.S.C. § 2541 but is exempted from liability for any acts prohibited by subsections (1), (2), (5), (6), (7), and (8). Pet. App. 6a, 13a. Based on that interpretation, the Federal Circuit disagreed with the district court's conclusion that any sales of PVPA-protected seed permitted under section 2543 were still subject to the notice requirement in 7 U.S.C. § 2541(6). Pet. App. 13a.

<sup>6</sup> On November 14, 1991, the district court modified a footnote in its prior opinion to clarify that the issue of whether the Winterboers had complied with Iowa labelling law, as required by 7 U.S.C. § 2543, had not been reached. Pet. App. 25a-26a.

The only quantitative limitation on PVPA seed sales that the Federal Circuit was able to discern from the statutory language of the exemption was that the seller and buyer of brown bag seed had to be persons whose "primary farming occupation is the growing of crops for sale for other than reproductive purposes." 7 U.S.C. § 2543. The Federal Circuit also held that, because "[t]he PVPA separately protects each novel seed variety," the "primary farming occupation" determination must be made on "a crop-by-crop basis" with respect to each specific novel variety protected under the Act.<sup>7</sup> Pet. App. 8a. In rejecting the district court's result along with its explanation, the Federal Circuit declared that "this court recognizes that, without meaningful limitations, the crop exemption could undercut much of the PVPA's incentives" but held that "[t]he Act, as written, however, contains no ensuing crop limitation as determined by the District Court." Pet. App. 12a.

Noting that section 2541(3) did not permit farmers to "market" protected novel varieties, the Federal Circuit cautioned that "an expansive reading of the term 'marketing' would swallow the entire crop exemption." Pet. App. 12a. To alleviate that concern, the Federal Circuit decided that "'[m]arketing' in the context of the PVPA is limited to extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet. App. 12a-13a. As a result, the Federal Circuit held that "[t]his form of marketing of sexually multiplied novel varieties violates exclusive rights under the Act, without regard to the crop exemption." Pet. App. 13a.

Judge Lourie, a member of the Federal Circuit panel, issued a concurring opinion that agreed solely with the

<sup>7</sup> Due to its "crop-by-crop" methodology as to how the "primary farming occupation" determination was to be made, the Federal Circuit's analysis and ruling differed significantly from the Winterboers' position before the district court.

panel's result and with "the panel's discussion of the limitation on saved seed which was the basis for the district court's decision." Pet. App. 14a. However, Judge Lourie stated that "I cannot join the remainder of the [panel's] opinion because it attempts to characterize and interpret other parts of this complex statute that I believe are not before us and have not been briefed." <sup>8</sup> Pet. App. 14a.

In its combined petition for rehearing and suggestion for rehearing in banc before the Federal Circuit, Asgrow reiterated and clarified the basis for the legal conclusions that had been consistently urged by Asgrow throughout the case; *i.e.*, that a farmer could sell no more of his crop of a protected variety as seed under section 2543 than he would have needed to produce a crop on his farm in the following year and that any such seed sales under section 2543 were still subject to the notice requirement of section 2541(6). However, Asgrow's suggestion for in banc review was declined by a 6-5 vote. Pet. App. 28a.

Judge Newman issued an extensive opinion dissenting from the denial of Asgrow's suggestion for rehearing by the full Federal Circuit, stating that the panel "has reached an interpretation of [the first sentence of 7 U.S.C. § 2543] that is contrary to the statute and its purpose." Pet. App. 30a. Judge Newman further stated:

The Act was not designed to permit farmers to grow and sell seed of certified varieties as a business, to enter the commercial seed business in competition with the creator of the new variety. The panel majority, by allowing up to half of a farmer's crop to be

<sup>8</sup> When ruling how a person's "primary farming occupation" was to be determined, the Federal Circuit did not have the benefit of any briefing. For purposes of the cross-motions for summary judgment, the parties had agreed that the Winterboers' "primary farming occupation" was the growing of crops for nonreproductive purposes. Moreover, the basis for such a comparison (*e.g.*, acres planted, crop size, income received, etc.) was also not at issue between the parties. Finally, neither party even suggested that the term "marketing" had anything other than its ordinary meaning.



sold as seed, authorizes this practice, in a travesty of statutory interpretation.

Pet. App. 32a (footnote omitted). Judge Newman also observed that "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. 30a. Judge Rader, the author of the Federal Circuit's opinion, took the unusual step of responding to Judge Newman's dissent. Four days later, he issued a separate opinion concurring in the denial of Asgrow's suggestion for rehearing. Pet. App. 28a-30a.

### SUMMARY OF ARGUMENT

Under a proper reading of 7 U.S.C. § 2543, the amount of PVPA seed which can be saved and sold as seed by a farmer without liability can be no more than the amount of seed that is necessary to produce another crop on the farmer's own farm. In the first clause of section 2543, Congress limited the amount of PVPA-protected seed that a farmer could produce and later sell for reproductive purposes by providing an exemption from that section's terms "to the extent that such action" may constitute an infringement under 7 U.S.C. § 2541(3), which prohibits sexually multiplying the novel variety as a step in marketing the variety for growing purposes.

The Federal Circuit erred by interpreting the first clause in section 2543—"except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title"—as providing that a farmer remains subject to infringement under subsections (3) and (4) of section 2541 and as exempting the farmer from the other acts of infringement set forth in section 2541(1), (2), (5), (6), (7), and (8). Contrary to that analysis, it is the initial exception of section 2541(3) from the exemption in the rest of the first sentence of section 2543 that provides the quantitative limit

on the amount of a protected novel variety that a farmer can later sell for use as seed.

Through that initial incorporation of the terms of section 2541(3), the first sentence of section 2543 does not apply where a person has sexually multiplied a novel variety as a step in marketing the variety for growing purposes. At most, only the quantity of PVPA seed that was sexually multiplied *not* as a step in marketing the variety for growing purposes can be permissibly sold under the terms of the remainder of the first sentence in section 2543. That limited amount is the portion of the farmer's crop that he retains for use in the production of a crop on his farm. Moreover, it is the only portion of the crop produced to which the provision allowing a farmer to "sell such saved seed" under certain conditions even applies.

The sale of PVPA-protected seed produced by a farmer in an amount greater than what the farmer needed to plant his own farm is therefore outside the scope of the limited exemption for sales of "such saved seed" in section 2543, and remains an infringement under section 2541. By later providing in the first sentence of section 2543 that the provisions of section 2541(3) were to be disregarded with respect to sales of "such saved seed" made to other farmers and in compliance with state law, Congress permitted a farmer to "sell such saved seed" without being liable for having sexually multiplied that limited portion of his harvest as a step in marketing the novel variety for growing purposes. Not only are the two references to section 2541(3) in section 2543 not redundant, but both are needed to accomplish Congress' purpose for the PVPA.

Through its first reference to section 2541(3), Congress withheld nearly all of a farmer's harvest from the scope of the exemption set forth in the remainder of the first sentence of section 2543, *i.e.*, that portion of the harvest in excess of that which was needed as seed in the



production of a subsequent crop on that farmer's own farm. Then, by adding the second reference to section 2541(3) in the proviso, Congress removed section 2541(3) as an obstacle to the farmer's sale of "such saved seed" as allowed by section 2543. Thus, Congress allowed the farmers to avoid wasting any of their harvest without threatening the commercial viability of the private seed breeding industry that the PVPA was enacted to stimulate. No other interpretation gives significance to each word and phrase in the first sentence of section 2543.

The Federal Circuit also erred when it held that 7 U.S.C. § 2541(6) did not apply to whatever sales of "such saved seed" are permitted under section 2543. Section 2541(6) provides that no person may "dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received." Congress did not grant a blanket exemption for all acts listed as infringements in section 2541 when it allowed a farmer to sell "such saved seed" in section 2543; it only exempted the action specified in the statute—the selling of seed. Thus, the first sentence of section 2543 only exempts those portions of section 2541 that prohibit the action later exempted: certain "sales" of a protected novel variety that would otherwise infringe under section 2541(1) for being sales of a novel variety and under section 2541(3) for having been sexually multiplied as a step in marketing the variety for growing purposes.

Each act listed in section 2541 is a separate act of infringement. When Congress granted farmers a narrow exemption in section 2543 to sell "such saved seed" under certain conditions, Congress did not absolve such farmers from all liability for all other types of infringement that might accompany the act of selling "such saved seed" under section 2543. The Federal Circuit erred by holding that the absence of section 2541(6) from the introductory clause of section 2543 meant that any seed sales author-

ized by section 2543 were also exempted from the notice requirements in section 2541(6). When properly construed, the express terms of section 2543 do not alter or implicate the requirement for notice in section 2541(6) or its underlying policies.

Section 2541(6) remains applicable to all transactions in which the novel variety has been dispensed to another in a form which can be propagated, including sales of "such saved seed" under section 2543. The policies supporting giving notice to all recipients of a PVPA-protected seed remain constant, regardless of the manner in which the seed was dispensed. Moreover, requiring notice on all seed sales, whether "brown bag" seed or not, is consistent with Congress' intent in 7 U.S.C. § 2567 that a purchaser or user of the protected seed have actual notice of prohibited acts before being subject to damages for infringement.

With respect to both questions presented, the Federal Circuit failed to give proper effect to the statutory language as written and enacted by Congress. Because Congress did not enact the law that the Federal Circuit created through its erroneous interpretation of section 2543, that interpretation must be reversed by this Court.

## ARGUMENT

### I. THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO THE STATUTORY LANGUAGE, THE EXPRESS INTENT OF CONGRESS, AND THE STATED PURPOSES FOR THE ACT

The legal protection provided by Congress in the PVPA to owners of novel plant varieties is critical to the private seed breeding industry's continued and future research activities in developing new and improved varietal seeds and bringing them to the market. That vital and needed protection has now been effectively repealed by the Federal Circuit's flawed interpretation of 7 U.S.C. § 2543. Unless the intended meaning of the statutory language of the first sentence of section 2543 is restored by this Court on both legal issues presented, the renewed development and continued competitiveness of American agriculture in plant varieties will be crippled by a ruling that is contrary to the language of section 2543, its legislative history, and Congress' express intent and purpose for the Act.

The Act provides that "[i]t is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end, so as to afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties." 7 U.S.C. § 2581. Yet the Federal Circuit's construction of section 2543 subverts that congressional intent and eviscerates the incentives and protections that Congress intended the Act to provide. No statutory scheme of intellectual property protection, particularly one covering a commodity that reproduces itself many times over, could have been designed by Congress with such immense loopholes that completely undermine its purposes.

By construing the limited exemption from infringement in section 2543 so that the Winterboers are able to sell *over twenty-two times more soybean seed* than they planted, the Federal Circuit has truly formulated an ex-

ception that swallows the rule.<sup>9</sup> Moreover, by simultaneously announcing that all seed sales made under section 2543 are exempted from the explicit statutory requirement in section 2541(6) that proper notice be given whenever the seed being dispensed is a PVPA-protected variety, the Federal Circuit has independently removed the incentives and protections provided by the PVPA, regardless of the quantity of seed sales permitted under section 2543.

Statutes should be construed to avoid attributing absurd results to Congress. *E.g.*, *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 453-55 (1989); *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892); *Oates v. First National Bank of Montgomery*, 100 U.S. (10 Otto) 239, 244 (1879). However, this is not a case in which the Court is being asked to interpret a statute in a manner contrary to its literal wording so that the statutory purpose or legislative intent can be preserved in spite of conflicting statutory language. In this case, the express wording of the statute, the explicit Congressional intent set forth in the Act itself, and the stated purposes and policies for the Act are entirely consistent. Instead, it is the interpretation by the Federal Circuit that creates the absurd consequences that are wholly inconsistent with the express language, history, and purpose of the Act.

#### A. By Excepting Action That Might Infringe Under Section 2541(3) From The Exemption Of Section 2543, Congress Limited The Amount Of A Novel Variety That Could Be Sold As Seed Under Section 2543

Section 2543 does not directly limit the amount of PVPA-protected seed that can be saved; it only limits the amount of such seed that can be saved *and* sold as seed.

<sup>9</sup> See, e.g., *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (any exemption from legislation must be narrowly construed, giving due regard to the plain meaning of the statutory language and the intent of Congress).



Without more, the mere act of saving the crop of a novel variety produced from "authorized seed"<sup>10</sup> is not an infringement under any subsection of 7 U.S.C. § 2541.<sup>11</sup> A farmer may plant, grow, and harvest as much of a protected novel variety as he is able, as long as he only saves it, uses it himself, or sells it to another for non-reproductive purposes. Infringement issues usually arise only when a farmer competes with the PVPA certificate owner by selling PVPA seed produced on his farm.

Allowing farmers to sell their crops of PVPA-protected varieties as seed at prices well below what the owner of the novel variety must charge to recover its development costs, will eventually strangle the private plant breeding industry that the PVPA was enacted to stimulate. Recognizing that, Congress provided a quantitative limitation in section 2543 on the amount of PVPA-protected novel variety seed produced by a farmer that could be sold for reproductive purposes to other farmers.

The Federal Circuit construed section 2543 so that the "primary farming occupation" phrase operates as the only quantitative restriction on the amount of a novel variety that may be sold as seed. However, that is not the quantitative limitation created or intended by Congress.<sup>12</sup> As

<sup>10</sup> In accordance with the express language in section 2543, the term "authorized seed" is used herein by Asgrow to signify any "seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes." See Pet. App. 41a.

<sup>11</sup> Where a farmer has saved more seed than he could reasonably use to produce another crop on his farm, any portion of that excess saved seed that is later sold for reproductive purposes is an infringement under section 2541(3) not because it was saved as seed, but because it necessarily must have been sexually multiplied as a step in marketing the novel variety for growing purposes.

<sup>12</sup> See Pet. App. 36a (Newman, J., dissenting) ("[t]he panel has misinterpreted this text, for this provision is directed to whether a farmer may sell *any* saved seed, not how much seed the farmer may sell (emphasis in original)).

shown below, the first sentence of section 2543, as enacted by Congress, contains the specific quantitative limitation on a farmer's right to sell PVPA seed that was identified by Asgrow and the district court—that amount of seed needed by the farmer to produce another crop on his farm.

**1. The Federal Circuit Misconstrued The Introductory Clause Of Section 2543 And Its Incorporation Of Section 2541(3)**

"It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 683 (1985) (citation omitted). Section 2543 starts with the following language:

*Except to the extent that such action may constitute an infringement under subsection (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him . . . and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section . . . .* (Emphasis added.)

Pet. App. 41a. The Federal Circuit concluded that the introductory clause meant that a farmer falling within the exemption set forth in section 2543 remains subject to infringement under subsections (3) and (4) of 7 U.S.C. § 2541, but not under subsections (1), (2), (5), (6), (7), and (8). Pet. App. 6a. That construction distorts the words and phrasing used by Congress in section 2543 and skews the relationship between section 2543 and the provisions in section 2541.

When the initial portion of section 2543 is given its proper effect, it is clear that the amount of PVPA seed that can be saved and sold as seed by a farmer is limited to precisely what Asgrow contends that Congress provided in the statute. Under section 2541(3), it is an act of infringement to "sexually multiply the novel variety as a step in marketing (for growing purposes) the variety."



Pet. App. E, p. 40a. Contrary to the Federal Circuit's analysis, the introductory clause of section 2543 only means that the exemption in the rest of the first sentence in the statute does not apply if the action in question constitutes sexually multiplying a PVPA-protected novel variety as a step in marketing the variety for growing purposes.<sup>13</sup>

In this case, there can be no question that the Winterboers "sexually multiplied" a protected novel variety because it is not disputed that they produced approximately 45 bushels of soybeans from each bushel of Asgrow seed planted. It is also undisputed that the Winterboers sold nearly all such soybeans produced for use as seed (*i.e.*, for growing purposes) without authorization from or compensation to Asgrow. Thus, the sole remaining question is the extent to which that action by the Winterboers constituted "a step in marketing" the Asgrow soybean varieties for growing purposes.

Absent an express definition in the statute, the term "marketing" in section 2541(3) should be given its ordinary, common meaning. *E.g.*, *Perrin v. United States*, 444 U.S. 37, 42 (1979). Without support, however, the Federal Circuit announced that "'marketing' in the context of the PVPA is limited to extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet. App. 12a-13a. However, it is "selling" that is a subset of "marketing," not vice versa. *Cf. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 215 (9th Cir.) ("We think the term *marketing* is far broader than the word *sell*."), *cert. denied*, 419 U.S. 999 (1974).

<sup>13</sup> Because the Winterboers were not alleged to have infringed under 7 U.S.C. § 2541(4), the introductory clause of section 2543 will be discussed herein only in terms of its incorporation of the provisions of section 2541(3).

For purposes of section 2541(3), "marketing" can only be interpreted to include *all* acts that lead up to and include selling PVPA seed for reproductive purposes, including direct farmer-to-farmer sales of saved seed.<sup>14</sup> In all cases where PVPA seed has been sold by a person who produced that seed, the "sexual multiplication" of the novel variety which led to that person having any seed to sell is clearly "a step" in the marketing of the novel variety for growing purposes. Without that step, there would be no seed for the farmer to sell.

**2. The Only Portion Of A Crop Produced From Authorized Seed That Can Be Sold As Seed Under Section 2543 Is The Amount Needed To Produce Another Crop On The Farmer's Own Farm**

Congress provided a specific quantitative limitation on the amount of PVPA seed that can be sold under section 2543 by expressly excepting action that might constitute an infringement under section 2541(3). That limitation is the portion of a farmer's crop that was sexually multiplied *not* as a step in marketing the novel variety, but only for future use as seed on the farmer's own farm. It is only that amount of saved seed that can be permissibly sold to others for use as seed under the remainder of the first sentence in section 2543, and it is that amount which is the maximum part of a farmer's crop that can be the "such saved seed" to which the rest of that first sentence applies.

<sup>14</sup> *Webster's New World Dictionary*, 828 (3d col. ed. 1988), defines "marketing" as (1) "the act of buying and selling in a market" and (2) "all business activity involved in the moving of goods from the producer to the consumer, including selling, advertising, packaging, etc." The Federal Circuit relied on the same dictionary to obtain the "customary meaning" of the term "primary" as used in section 2543. Pet. App. 8a. There is no indication that Congress used ordinary definitions for some common words in section 2543 but not for others. *See* Pet. App. 35a; *see also* Brief of United States as Amicus Curiae, at 10 n.7 (hereinafter "U.S. Petition Brief").

To illustrate, assume that a farmer with a 1,000-acre farm plants Asgrow's PVPA-protected soybean seed on his farm (using 1 bushel of seed per acre) and produces a crop of 45,000 bushels (45 bushels per acre). Under the Federal Circuit's interpretation of section 2543, that farmer could then sell up to 22,500 bushels of his crop to other farmers for use as seed, *i.e.*, over twenty-two times more seed than that sold to the farmer by the certificate owner. In stark contrast, Asgrow contends that the exemption in section 2543 expressly limits that same farmer to selling no more than the 1000 bushels of seed needed to produce another crop on his farm, as concluded by the district court.<sup>15</sup>

In that situation, the most that the farmer would need to save to use in the production of another crop on his farm would be 1,000 bushels (1 bushel of seed per acre). If the farmer saves more than 1,000 bushels to use as seed, he must be presumed to have done so in order to sell it as seed because that excess seed will not be needed to produce a crop on his farm. Thus, any of the remaining 44,000 bushels from his crop that are sold for use as seed are outside the scope of the exemption in the first sentence of section 2543 because such seed will necessarily have been sexually multiplied as a step in marketing the novel variety for growing purposes.

<sup>15</sup> Under the facts of this case, the Winterboers produced 12,037 bushels of Asgrow PVPA-soybeans on 265 acres of their 800-acre farm. Asgrow contends that section 2543 limits them to saving and selling no more than the amount of seed needed to replant a crop on their farm. Under the Federal Circuit's interpretation, the Winterboers could have lawfully sold up to 6,018 bushels of their Asgrow soybean crop as seed (they actually sold 10,529 bushels). In contrast, the Winterboers contended that they could have sold all 12,037 bushels as seed because they sold their non-soybean crops for nonreproductive purposes and earned less than 25% of their income from soybean seed sales. Under that view, they would have been able to sell more than 24,000 bushels of Asgrow seed (if they had produced that much) before their "primary farming occupation" was no longer the growing of crops for nonreproductive purposes.

The 1000 bushels of seed is the maximum amount that the hypothetical farmer could possibly have produced *without* having undertaken sexual multiplication as a step in marketing the protected variety for growing purposes. Those 1000 bushels of soybean seed saved to plant the farmer's own farm constitute the "such saved seed" referenced in section 2543. Thus, the Federal Circuit plainly erred when it concluded that "section 2543 does not contain any explicit limit that a farmer can save and sell only as much seed as necessary to plant an ensuing crop." Pet. App. 11a. Contrary to that court's analysis, it is the initial exception of section 2541(3) from the exemption in section 2543 that provides the quantitative limit on the amount of a protected novel variety that a farmer can later sell for use as seed under the terms of the statute, *i.e.*, the amount of seed necessary to produce a crop in that variety on the farmer's own farm.<sup>16</sup>

The only farming tradition that Congress sought to uphold through the "right to save seed" provision of section 2543 was the pragmatic practice of farmers saving enough seed from their crop to replant their own farms. Pet. App. 32a. What Congress allowed in that sentence was the sale of "such saved seed" between farmers when the selling farmer had a change of plans and no longer needed the seed that he had saved for his own use in planting his own farm. Under that provision, when properly interpreted, no portion of the farmer's crop would go unused but no incentive would be created to cause the farmer to save more seed than would be needed on his

<sup>16</sup> Contrary to the Federal Circuit's opinion (Pet. App. 11a), the district court did not hold that one bushel of seed per acre was the applicable limit under section 2543 for all varieties. Unlike the Federal Circuit, Congress and the district court recognized that the amount of seed needed to be planted per acre will differ for each novel variety at issue. See Pet. App. 21a-22a & n.3. For that reason, section 2543 was written by Congress with functional terms that are applicable and quantifiable for any type of crop, size of farm, or other specific circumstances.



own farm. Congress never intended to preserve a farmer's ability to sell seed in commercial quantities, or to provide a vehicle by which traditional farmers would be tempted to become seed dealers in protected varieties.<sup>17</sup>

**B. After Limiting The Amount Of Saved Seed, Congress Allowed Sales Of "Such Saved Seed" To Take Place Between Farmers Without Violating Section 2541(3)**

Congress did not prohibit *all* sales of PVPA seed by persons other than the owner. To the extent that "such saved seed" is not actually used to produce a crop on the farmer's farm, that limited amount of saved seed is available to be sold as provided.<sup>18</sup> The applicable provision is as follows:

*Provided, That without regard to the provisions of section (3) of section 2541 of this title, it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.*

Pet. App. 41a (emphasis added). After misconstruing the first reference to section 2541(3) in the introductory clause of section 2543, the Federal Circuit then failed to attribute any independent meaning to the second reference to section 2541(3) in the above provision.

<sup>17</sup> See Pet. App. 32a (Newman, J., dissenting) ("The Act was not designed to permit farmers to grow and sell seed of certified varieties as a business, to enter the commercial seed business in competition with the creator of the new variety.").

<sup>18</sup> In the previous example, the farmer could plant the 1,000 bushels of saved seed to produce another crop on his farm, or sell some or all of "such saved seed" to other farmers under the terms of section 2543. However, no more than a total of 1000 bushels of saved PVPA-protected seed could be planted *and* sold by that farmer.

"[A] statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, — U.S. —, 112 S.Ct. 1011, 1015 (1992); see also *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914). The Federal Circuit assumed that the two references to section 2541(3) were redundant, as its sole mention of them was the following: "[i]n two explicit references, the Act clarifies that the crop exemption does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541." Pet. App. 12a. That construction is simply wrong. Not only are the two references to section 2541(3) not redundant, but Congress included both for a specific reason.

If the second reference to section 2541(3) had not been included by Congress in section 2543, a farmer would still be unable to sell *any* of the PVPA seed saved for use on his own farm because, as soon as the farmer decided to sell some of his "saved seed" to another, the seed being sold would then have been sexually multiplied as a step in marketing it for growing purposes. By providing that the provisions of section 2541(3) are to be disregarded with respect to "such saved seed" sold in compliance with state law by a farmer to other farmers, Congress permitted a farmer to sell "such saved seed" (but no more) without being liable for having sexually multiplied that portion of his harvest as a step in marketing the novel variety for growing purposes (regardless of how narrowly or broadly the term "marketing" is defined).

The two distinct references to section 2541(3) in section 2543 were both necessary to accomplish Congress' stated purpose for the PVPA. Through its first reference to section 2541(3) in the initial clause, Congress withheld nearly all of a farmer's harvest from the scope of the exemption set forth in the remainder of the first sen-



tence of section 2543, *i.e.*, that portion of the harvest in excess of that which was needed as seed in the production of a subsequent crop on that farmer's own farm. By so limiting the scope of the exemption, Congress afforded seed companies the opportunity to recoup the sizeable investments which resulted in the novel variety in the first place. Then, by adding the second reference to section 2541(3) in the proviso, Congress removed section 2541(3) as an obstacle to the farmer's sale of "such saved seed" as allowed by section 2543. In that manner, Congress allowed the farmers to avoid wasting any of their harvest without threatening the commercial viability of the private seed breeding industry it sought to stimulate.

Far from reaching an absurd result, Asgrow's interpretation gives effect to both references to section 2541(3) and is true to the purposes that the PVPA was designed to foster.<sup>19</sup> See *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643-45 (1978). The same cannot be said of the interpretation made by the Federal Circuit or the one offered by the Winterboers. As aptly stated by Judge Newman, the Federal Circuit's construction of the first sentence of 7 U.S.C. § 2543 as allowing up to half of every crop produced from PVPA-protected seed to be sold as seed is truly "a travesty of statutory interpretation." Pet. App. 32a.

<sup>19</sup> Congress would not have excluded action constituting an infringement under section 2541(3) from the scope of the exemption in section 2543 only to permit that same action to fall within the exemption when sales of "such saved seed" were later allowed without regard to the provisions of section 2541(3). To conclude otherwise would be to impermissibly hold that the two references to section 2541(3) in section 2543 would be self-cancelling and without significance. See, *e.g.*, *Connecticut National Bank v. Germain*, — U.S. —, 112 S.Ct. 1146, 1149 (1992).

### C. The Legislative History Confirms That The Right To Sell "Such Saved Seed" Is Limited To The Amount Needed For Producing A Crop On The Farm

Asgrow's interpretation is entirely consistent with the applicable legislative history, which shows that section 2543 is a combination of two proposed provisions originally considered by Congress in the following form:

#### Sec. 112. Right to Save Seed.

Except under subsections (3) and (4) of section 111, it shall not infringe any right hereunder for a person to save seed and grow the resulting variety for his own use.

#### Sec. 114. Crop Exemption.

It shall not be an infringement to sell seed grown from the protected variety, obtained (for growing) by authority of the proprietor or by saving seed under section 112, for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose, and is in channels which are usual for that purpose and in a manner exclusively for that purpose.

S. Rep. No. 3070, 91st Cong., 1st Sess. (1969), H.R. Rep. No. 13631, 91st Cong., 1st Sess. (1969). At that time, the proposed legislation contained no right to sell a protected variety for use as seed.

Sections 112 and 114 (and their titles) were later combined into a single section (Sec. 113) that is now 7 U.S.C. § 2543. Both houses of Congress summarized the newly-created ability of a qualified farmer to sell "such saved seed" for reproductive purposes as follows:

#### Section 113. Right to Save Seed. Crop Exemption.

This section authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; to save seed from such crop for future use or planting on the farm; or, if his primary

farming occupation is the growing of crops for sale for other than reproductive purposes, *to sell such saved seed for reproductive purposes* to other persons so engaged.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970); S. Rep. No. 91-1138, 91st Cong., 2d Sess. 12 (1970) (emphasis added). From those summaries, it should have been clear that the right to sell a protected novel variety was restricted only to the seed saved from the farmer's crop "for future use or planting on the farm."

Despite quoting the same provision in the legislative record, the Federal Circuit somehow reached the opposite view of its plain language, holding that "[a]t no point did the legislative context for the text of the 1970 Act suggest that the crop exemption contains an ensuing crop limitation." Pet. App. 10a. On the contrary, the "suggestion" from the legislative history sought in vain by the Federal Circuit is quite explicit, and should have been persuasive support for the interpretation urged by Asgrow.

## II. THE NOTICE REQUIREMENTS OF SECTION 2541(6) MUST APPLY TO ANY SALES MADE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 2543

The second important statutory interpretation question presented is whether any sales of PVPA-protected seed authorized by 7 U.S.C. § 2543 remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the purchaser that the seed being sold is a PVPA-protected novel variety.<sup>20</sup> Section 2541(6) provides that

<sup>20</sup> This Court need not address the sufficiency of the specific notice by the Winterboers when resolving the legal question of whether section 2541(6) notice is required on seed sales made under section 2543. However, Asgrow submits that notice under section 2541(6) should be required as a matter of law to be given simultaneously with the transaction in question so as to alert the

it is an infringement of the rights of the owner of a novel variety to "dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received."<sup>21</sup> Pet. App. 40a. In its order, the district court specifically held that "[t]his court interprets this language [in section 2541(6)] to require that if a farmer does sell saved seed to another farmer he must label it as a protected variety." Pet. App. 17a, n.2.

In reversing, the Federal Circuit relied on its erroneous construction of the initial clause in section 2543, *i.e.*, that a farmer remains subject to infringement liability under subsections (3) and (4) of section 2541 but is exempted from liability for the acts set forth in section 2541(1), (2), (5), (6), (7), and (8). *See* Pet. App. 13a ("[b]ecause subsection (6) [of section 2541] is not included as an exception to the crop exemption, a qualifying sale under section 2543 remains exempt from the notice requirement"). Just as that incorrect analysis of the initial clause of section 2543 precipitated legal error with respect to how much PVPA-protected seed can be sold by a qualified farmer, the Federal Circuit erred in holding that farmers selling brown bag PVPA-protected seed are no longer subject to the notice provision of section 2541(6) when selling under the "saved seed" exemption in section 2543.

The question of whether section 2541(6) notice applies to section 2543 seed sales has great importance to the future effectiveness and enforcement of the PVPA.

recipient to the PVPA and its terms. The Winterboers admittedly did not do so. Tr. 32-33 (Injunction Hearing, March 26, 1991).

<sup>21</sup> A parallel provision in patent law is found in 35 U.S.C. § 287, referred to as the patent "marking" statute. *See, e.g., American Medical Sys. v. Medical Eng. Corp.*, 6 F.3d 1523, 1538 (Fed. Cir.) (the purpose of section 287 is "to encourage the patentee to give notice to the public of the patent"), *cert. denied*, 62 U.S.L.W. 3722 (1994).



In its amicus curiae brief in support of the petition, the United States agreed that the issue as to whether section 2541(6) applies to brown bag seed sales warrants review by this Court in conjunction with review of the first question presented. *See* U.S. Petition Brief, at 20 n.17. At the same time, the United States suggested that the district court had “decline[d] to rule on the Section 2541(6) issue.” *Id.* However, not only does footnote 2 in the district court’s opinion show that the section 2541(6) notice question presented here was decided by that court, Pet. App. 17a n.2, but that question has been at issue at all times throughout this case.<sup>22</sup>

The belief that the district court did not decide the section 2541(6) notice issue overlooks the distinction drawn by that court between the federal “notice” requirement in section 2541(6) and state “labeling” laws as incorporated into section 2543. The notice issue only required the district court to construe the effect of section 2543 on the requirements of section 2541(6) by interpreting the express language of the PVPA already at issue. That analysis resulted in footnote 2 of the district court’s opinion. In contrast, the “labeling” requirement of section 2543 arises from its separate provision that any sales of “such saved seed” must comply with “such State laws governing the sale of seed as may be applicable.” Pet. App. 41a; *see, e.g.*, Iowa Code, § 199 (1989). By not addressing the Winterboers’ compliance

<sup>22</sup> Asgrow’s complaint pled the section 2541(6) notice issue. JA 38-39. Asgrow’s motion asserted liability on that basis. *See* Asgrow Memorandum In Support Of Its Motion For Summary Judgment, at 5. The district court held that any sales of PVPA seed under section 2543 remained subject to the notice requirement of section 2541(6). Pet. App. 17a n.2. On appeal, Asgrow raised the notice issue as a basis for affirming the district court’s finding of liability, that notice issue was then briefed by both parties, and was decided by the Federal Circuit. Pet. App. 13a. Finally, Asgrow raised the notice issue as the second question presented in its petition for certiorari without objection by the Winterboers, and certiorari was granted by this Court on both questions.

with state law, the district court avoided an unnecessary analysis of Iowa state seed law, which has labeling and other requirements independent of the notice required by Congress in section 2541(6).<sup>23</sup>

Without doubt, this Court properly decided to review the section 2541(6) notice issue in conjunction with the issue of how much PVPA-protected seed can be sold under section 2543. As noted, the Winterboers made no procedural objection under Sup. R. 15.1 to the notice issue being raised in Asgrow’s petition. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 383-84 (1989). Instead, the Winterboers only addressed the merits, asserting that “[w]hether the Federal Circuit’s correct ruling on [the notice] issue should be reviewed by this Court requires no more than a cursory reading of section 2543, which is unambiguous on this point.” Opposition to the Petition for Certiorari, p. i, at n.\*. As shown below, the “cursory” analysis offered by the respondents is simply wrong. Moreover, the statutory construction devised by the Federal Circuit that section 2543 exempts sales of “saved seed” from the notice requirement of section 2541(6) should be reversed as a matter of law.

<sup>23</sup> A farmer selling seed under section 2543 is required to comply with any applicable state law requirements in addition to those in the PVPA. Pet. App. 41a. However, state seed laws apply to all seed, not just to seed of protected novel varieties. Only two states presently require Plant Variety Protection labeling as a matter of state law. *See* Ariz. Rev. Stat. Ann. § 3-237(6) (1993); Colo. Rev. Stat. § 35-27-113(1)(g-h) (1993). Because the important protections of the Act should not be allowed to vary from state to state, to the extent that any state’s seed laws require less or different notice than that specified by Congress in the PVPA, such state laws should not excuse non-compliance with section 2541(6). *See, e.g., Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (“states are free to regulate the use of . . . intellectual property in any manner not inconsistent with Federal law”).



**A. Section 2543 Only Provides A Limited Exemption From Infringement For Certain Sales Of Protected Seed That Would Otherwise Infringe Under Subsections (1) And (3) Of Section 2541**

The legal conclusion urged by Asgrow that the notice requirement of section 2541(6) applies to all sales of seed under section 2543 flows directly from the language used by Congress in the two statutes. Section 2541 lists the acts which shall be an infringement of the rights of the owner of a novel variety, "[e]xcept as otherwise provided in this subchapter." Pet. App. 41a. Because Congress did provide otherwise in section 2543 with respect to certain sales of PVPA seed, infringement liability is avoided for those acts which were specifically exempted in section 2543 when performed in accordance with the other conditions of the statute.<sup>24</sup>

The first sentence of section 2543 can only properly be construed as providing a limited exemption from infringement solely with respect to those portions of section 2541 that prohibit the specific "action" later exempted: certain sales of a protected variety that would otherwise be infringements under subsections (1) and (3) of section 2541. The only actions affected by the first sentence of section 2543 are (1) saving seed produced, (2) using such saved seed in the production of a crop for use on the farm, and (3) using such saved seed for sale as provided. Pet. App. 41a. Two of those acts—saving seed and using seed to produce a crop for use on the farm—are not prohibited under any part of section 2541 and thus do not need to be exempted in order to be per-

<sup>24</sup> See, e.g., *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, — U.S. —, 114 S.Ct. 517, 524-25 (1993) (must generally adhere to "tight reading of exemptions from comprehensive schemes"); *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) (where general statement of policy is qualified by exception, exception is read narrowly to preserve the primary operation of the provision); *Phillips*, 324 U.S. at 493.

formed. Only the third act—selling PVPA-protected seed—is otherwise an act of infringement. Thus, only the act of selling "such saved seed" was exempted by Congress.

Under the terms of the exemption in the first sentence of section 2543, Congress expressly allowed a person "to sell such saved seed" without incurring liability under section 2541(1) for "sell[ing] the novel variety" to the extent that the sales of the protected variety are made in accordance with the other provisions of section 2543. In addition, because of the second reference to section 2541(3) in the proviso of section 2543, there is also no liability under section 2541(3) for having "sexually multipl[ied] the novel variety as a step in marketing (for growing purposes) the variety" to the extent that the sales in question are limited in quantity to "such saved seed" as provided by section 2543. See *supra* section I.B. However, those express exemptions from the acts of infringement set forth in subsections (1) and (3) of section 2541 are the sole extent of the exemptions provided by Congress in section 2543.

No other subsection of section 2541 is implicated by the limited exemption for seed sales under section 2543, including the acts prohibited by section 2541(6): dispensing a novel variety to another in a form which can be propagated without giving notice of it being a protected variety.<sup>25</sup> In addition to subsection (6), the other "non-sale" acts listed in subsection (1) and all of the acts covered by subsections (2), (5), (7), and (8) of section

<sup>25</sup> As used in section 2541(6), the term "dispense" is not limited only to sales of a protected novel variety. Cf. *Palmer v. United States*, 340 F.2d 48, 50 (5th Cir. 1964) (the term "dispense" is broader than more narrow term "sell"), *cert. denied*, 382 U.S. 903 (1965). Thus, section 2541(6) should be interpreted as being applicable to any distribution, sale, or transfer of ownership or possession of a protected novel variety in a form which can be propagated, including but not limited to any seed sales made in accordance with section 2543.

2541 should remain applicable to any seed sales authorized under section 2543. For example, a farmer who sells PVPA seed under section 2543 is still not able to export the novel variety in violation of section 2541(2) merely because section 2543 permits him to sell to another farmer that limited amount of PVPA seed that had been saved to produce another crop on his own farm.

By virtue of being one of many acts listed in section 2541, the act of selling a novel variety is distinct from the other acts of infringement listed by Congress. Because each listed act is a separate act of infringement,<sup>26</sup> Congress did not exempt all other distinct acts of infringement when it expressly allowed only certain sales of seed in accordance with the terms of section 2543. Thus, by exempting only *sales* of "such saved seed" from infringement liability, Congress did not also exempt the importation or exportation of "such saved seed" of a novel variety under section 2541(2), did not exempt the use of "such saved seed" to produce a hybrid or different variety under section 2541(4), and did not exempt using "such saved seed" to instigate or actively induce other acts of infringement under section 2541(8). Most importantly for present purposes, Congress did not authorize the seller to dispense "such saved seed" without notice under section 2541(6) that the seed is of a protected variety.

By seeking to recover for any sales of Asgrow PVPA-protected soybean seed that were made by the Winterboers without the notice required by Congress, Asgrow is properly seeking to enforce the separate infringement provision in section 2541(6) that a protected novel va-

<sup>26</sup> The same is true under the patent laws, which give patentees three distinct and independent rights; *viz.*, the right to make, the right to use, and the right to sell. See 35 U.S.C. §§ 154, 271(a); *Daimler Mfg. Co. v. Conklin*, 170 F. 70, 71 (2d Cir. 1909), *cert. denied*, 216 U.S. 621 (1910); *Whittemore v. Cutler*, 29 F. Cas. 1120, 1121 (No. 17,600) (C.C.D. Mass. 1813).

riety may not be dispensed to another in a form that can be propagated without notice of being a protected variety. To the extent that any such acts of "dispensing" Asgrow's protected novel variety constitute authorized sales of seed under section 2543, only section 2541(6) would be at issue because Asgrow would not be entitled to prove liability under those portions of sections 2541(1) and 2541(3) which have been exempted by Congress with respect to such sales. However, to the extent that any acts of selling Asgrow PVPA seed exceed the quantitative limit on such sales found in section 2543, Asgrow could assert and would be entitled to prove liability under subsections (1), (3), and (6) of section 2541, as properly happened in this case.

The interpretation that Congress did not allow seed sales under the first sentence of section 2543 to be made without notice is further supported by the last sentence of section 2543. In the latter sentence, Congress expressly provided that a purchaser who diverts PVPA-protected seed to reproductive purposes from the usual channels used in selling such seed for nonreproductive purposes shall be deemed to have notice for purposes of section 2567 that his actions constitute an infringement. Pet. App. 41a. Congress surely would not have provided for imputed notice to purchasers in that situation while simultaneously providing the immense loophole from providing express notice allowed by the Federal Circuit with respect to sales of PVPA seed under section 2543. See also Brief Of Amicus Curiae Intellectual Property Owners In Support Of The Petition, at 7. The inescapable legal conclusion is that Congress did not exempt any seed sales permitted under section 2543 from the requirements of section 2541(6).

The Winterboers' assertion that notice is not required on their brown bag seed sales arises from a myopic reliance on the phrase "it shall not infringe any right hereunder" as a talisman against all infringement liability



when seed sales are made under section 2543. According to them, that phrase signifies that Congress eliminated all types of infringement liability for any of the acts listed in section 2541 whenever PVPA-protected seed is sold in accordance with section 2543. That "cursory" analysis fails to recognize that the only "action" which Congress stated "shall not infringe any right hereunder" was limited solely to the act of selling seed, under the circumstances specifically recited in the statute. Thus, any reliance on that phrase to excuse other infringing acts taken in addition to or in conjunction with the limited statutorily-authorized act of selling PVPA-protected seed is mistaken.

Similarly, the Federal Circuit's analysis concluding that section 2541(6) notice was not required for seed sold in accordance with section 2543 stemmed from its misapprehension of the significance of the initial clause of section 2543. As previously shown, the clause "[e]xcept to the extent that such action may constitute an infringement under subsections (3) and (4)" does not except subsections (3) and (4) of section 2541 from the remainder of section 2543. Instead, that initial clause of section 2543 operates to remove nearly all of a farmer's crop from the scope of the exemption in the remainder of the first sentence, but does not exempt the applicability of sections 2541 (1), (2), and (5) through (8) to "saved seed" sales made under section 2543. *See supra* section I.A.

If Congress had intended to exempt seed sales made under section 2543 from the statutory notice provisions, it could have done so by including a reference to section 2541(6) together with the second reference to section 2541(3) following the term "*Provided*" in the first sentence of section 2543. In that case, any sales of "such saved seed" under section 2543 would not give rise to liability for omitting the notice otherwise required by section 2541(6) in the same manner that the proviso in the

first sentence of section 2543 allows such seed to be sold "without regard to the provisions of section 2541(3)." Pet. App. 41a. However, that is not what Congress did. Because Congress did not allow any PVPA seed to be sold under section 2543 without regard to the notice provisions of section 2541(6), it was not within the province of the Federal Circuit to create such an exemption.<sup>27</sup>

**B. The Policies Supporting Giving Notice To All Recipients Of PVPA-Protected Seed Remain Constant, Regardless Of The Type Of Transaction Involved**

In enacting section 2541(6), Congress expressly provided that notice was to be given of the PVPA-protected status of any novel variety seed being dispensed to another and that dispensing PVPA-protected seed without such notice would give rise to infringement liability. Under this statutory scheme, if a party legitimately dispenses the owner's PVPA seed with proper notice, any future infringement liability arising from the unlawful sale or transfer of that seed or its progeny attaches to the party receiving the seed, who now has been put on notice of the seed's PVPA-protected status (and presumably of the PVPA's terms and conditions). On the other hand, if proper notice is not given at the time of sale, the party dispensing the PVPA-protected seed into the market without the required notice at least remains subject to infringement liability for having done so.

The underlying policy for encouraging notice is reflected in the restrictions imposed by Congress in 7 U.S.C. § 2567 on a certificate owner's remedies in the absence of notice. In pertinent part, section 2567 provides:

<sup>27</sup> *See, e.g., Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) (courts "are not at liberty to create an exception where Congress has declined to do so"); *Fedorenko v. United States*, 449 U.S. 490, 513 n.35 (1981) ("It is not the function of the courts to amend statutes under the guise of 'statutory interpretation.'" (citation omitted)).



In the event the novel variety is distributed by authorization of the owner and is received by the infringer without such marking, no damages shall be recovered against such infringer by the owner in any action for infringement, unless the infringer has actual notice or knowledge that propagation is prohibited or that the variety is a protected variety, in which event damages may be recovered only for infringement occurring after such notice. As to both damages and injunction, a court shall have discretion to be lenient as to disposal of materials acquired in good faith by acts prior to such notice.

See Appendix. If the purchaser of PVPA-protected seed does not receive notice of its protected status, he or she may not be aware of the statutory conditions on the later disposition of the crop produced from that seed. Even if "brown bag" seed is not considered to be distributed by authority of the certificate owner, the last sentence of section 2567 will hamper the owner's ability to obtain damages and/or an injunction against an "innocent" seed seller who purchased the brown bag seed in good faith without notice that it was a PVPA-protected variety.

By requiring that notice be given on *all* sales of PVPA-protected seed, whether by the owner or under the exemption of section 2543, Congress safeguarded an owner's ability to protect its investment once the novel variety was introduced into the marketplace. As one example, assume that a brown bagger sold the amount of protected soybean seed authorized under section 2543, but did so without complying with section 2541(6). When planted, the "unmarked" seed would be multiplied by a factor of 45 and the resulting crop could be sold for reproductive purposes. However, section 2567 could foreclose the owner from obtaining any remedy, regardless of how much seed was later sold from the crop produced from the "unmarked" seed, even though the lack of notice occurred through no fault of the owner. Thus, once "unmarked" seed is dispensed into commerce, the ability of a certificate owner

to protect its investment and statutory rights will likely be irreparably compromised as soon as that seed is multiplied by growing the next crop.

The policy decision by Congress in section 2543 to allow farmers to sell their saved seed if planting plans change should not be construed so that farmers may sabotage the owner's market for the protected seed by failing to give the statutory notice on such sales. Moreover, requiring notice on all seed sales under section 2543 eases an owner's already-difficult task of protecting its investment and policing its market. If an owner learns that its PVPA seed is being sold without notice, the owner should have the option of bringing an enforcement action on that basis alone, whether the seller's sales are otherwise within section 2543 or not.<sup>28</sup> Thus, the policies for giving notice to the public remain best served by requiring such notice whenever PVPA-protected seed is dispensed, which is why Congress did not exempt the requirements of section 2541(6) from applying to any seed sales made under section 2543.

The policies supporting providing notice to all recipients of a PVPA-protected seed remain constant, regardless of the type of transaction involved. Moreover, requiring notice on all seed sales, whether "brown bag" seed sales or not, is consistent with Congress' intent in 7 U.S.C. § 2567 that a purchaser or user of protected seed be given actual notice of prohibited acts before being subject to remedies for infringement. Thus, regardless of how the quantitative limitation governing sales of "such saved seed" in section 2543 is interpreted by this Court, this

<sup>28</sup> Without notice being required on all seed sales under section 2543, certificate owners will surely be unable to enforce their remaining rights under the Act with respect to any seed grown from the "unmarked" brown bag seed. If a selling farmer is not liable for selling without proper notice and is the only source of proof that the purchasing farmer received actual notice, the practical difficulties of a certificate owner obtaining suitable testimony from the selling farmer in a suit against the purchaser will be enormous.

Court should hold that the notice requirement of section 2541(6) applies to all sales of PVPA-protected seed, even to the extent that such sales are properly made under the provisions in the first sentence of section 2543.

### **III. THE PURPOSES AND POLICIES UNDERLYING THE PVPA CAN ONLY BE PRESERVED BY RESTORING CONGRESS' INTERPRETATION ON BOTH STATUTORY ISSUES PRESENTED**

The proper resolution of both statutory interpretation issues presented is equally and vitally important to the future of the PVPA and the private plant breeding industry in the United States. A PVPA certificate owner has distinct interests in enforcing the limits on the amount of its PVPA-protected seed that can be sold under section 2543 and in ensuring that all of its PVPA seed is dispensed to the public with proper notice of its protected status. As to the former, each bushel of seed sold by another under section 2543 represents one less bushel on which the owner is able to recoup his investment costs through profit or royalties. As to the latter, each bushel sold without notice creates a potentially unlimited source of unauthorized seed sales insulated from recovery by the terms of section 2567.

By itself, restoring the statutory limit set by Congress on the quantity of PVPA-protected seed that can be sold under section 2543 to the amount needed to produce another crop on the seller's farm will not cure the disastrous effects of the Federal Circuit's current view of section 2543. Indeed, the Federal Circuit's failure to uphold Congress' requirement for notice on all transactions involving PVPA-protected varieties in a form which can be propagated will eliminate the incentives and protection of the PVPA just as surely (and nearly as quickly) as would the Federal Circuit's determination that up to half of a farmer's crop can be sold as seed under section 2543.

When the PVPA was enacted in 1970, the House Committee on Agriculture listed the benefits that were ex-

pected to accrue in the United States as a direct result of providing legal protection for plant varieties:

1. It will greatly stimulate plant breeding.
2. It will allow our Government agricultural experiment stations to increase their efforts on needed basic research.
3. It would permit public expenditures for applied plant breeding to be deviated to important areas which industry may not pursue.
4. It will give farmers and gardeners more choice, and varieties which are better in yield or in quality, and so forth.
5. It will make American agricultural products more competitive in world markets.
6. Consumers and other purchasers of crops will benefit; in some instances by improved quality, in others by aiding the production needed to serve them.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 2-3 (1970). If left intact by this Court, the Federal Circuit's erroneous interpretation of section 2543 will ensure that the policies supporting enactment of the PVPA will be frustrated and the benefits afforded by the statute to the American farmer will be eroded.

As recognized by Judge Newman, "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. 30a. Even before the Federal Circuit's crippling ruling, major seed companies such as Pioneer Hi-Bred International, Inc., Agripro Biosciences Inc., and Northrup King Co. were among those that had abandoned existing and reduced future variety research programs due to unfair price competition from illegal "brown bag" seed



sales of their own PVPA seed.<sup>29</sup> If left intact, the Federal Circuit's decision will cause a bad situation to become much worse.

The significant costs of plant breeding research must ultimately be justified through recouping that investment from sustained sales of the new varietal seeds which reach the market. The plant breeding industry cannot continue its research and development expenditures unless the results of its efforts are adequately protected from infringement. If the Federal Circuit's interpretation of section 2543 is accurate, seed companies have wasted an enormous amount of time and money over the past twenty years in developing novel plant varieties that they never had any legitimate chance of being able to protect. Having enacted the PVPA to encourage private industry to dedicate the necessary resources to breed new and improved plants, Congress clearly did not intend such a result.

Legislation was recently introduced to amend the PVPA "to make such Act consistent with the International Convention for the Protection of New Varieties of Plants of March 19, 1991, to which the United States is a signatory, and for other purposes."<sup>30</sup> S. Rep. No. 1406, 103d Cong., 2d Sess. (1994); *see also* H.R. Rep. No. 2927, 103d Cong., 1st Sess. (1993). The current versions provide that "[t]he first sentence of section 113 (7 U.S.C. § 2543) is amended by striking 'section: *Provided, That*' and all that follows through the period and inserting 'sec-

<sup>29</sup> For more detailed accounts of the scope and effects of illegal brown bag seed sales on the seed industry's past and future research efforts, see the Brief Amicus Curiae Of The American Seed Trade Association In Support Of Petitioner.

<sup>30</sup> The International Convention for the Protection of New Varieties of Plants, Mar. 19, 1991 is known by the French acronym "UPOV." Article 14(1) of the 1991 UPOV requires that there be authorization of the owner before the seed of a protected plant variety may be offered for sale. In addition, the proposed legislation amends or alters numerous other aspects of the PVPA not at issue before this Court.

tion.'" S. Rep. No. 1406, 103d Cong., 2d Sess. § 11 (1994); H.R. Rep. No. 2927, 103d Cong., 1st Sess. § 9 (1994). By striking that proviso from section 2543, the proposed bills would eliminate the statutory basis under which farmers can sell PVPA-protected seed to other farmers for reproductive purposes without authority from the certificate owner.<sup>31</sup>

The proposed amendments to the PVPA do not affect any existing PVPA certificates, such as the two Asgrow varieties at issue here. Section 15 of S. Rep. No. 1406 states:

Except as provided in this section, any variety for which a certificate of plant variety protection has been issued prior to the effective date of this Act, and any variety for which an application is pending on the effective date of this Act, shall continue to be governed by the Plant Variety Protection Act, (7 U.S.C. § 2321 et seq.), as in effect on the day before the effective date of this Act.

In addition, the proposed legislation provides that "[t]his Act and the amendments made by this Act shall become effective 180 days after the enactment of this Act." S. Rep. No. 1406, § 16. Thus, because the pending legislation is prospective only, it would not render the present case moot or insignificant. *See* U.S. Petition Brief, at 18 ("even if the bills are enacted in their present form, further review of the decision below would be warranted").

If the proposed bills are enacted into law, in practical effect Congress will have created *two* applicable versions of the PVPA, at least until the expiration of all PVPA certificates that are pending or issued as of 180 days after

<sup>31</sup> After being amended in several respects not related to section 2543 since the briefing on the petition for certiorari in this case, S. 1406 was passed by the Senate on May 25, 1994. As of the filing of this brief, H.R. Rep. No. 2927 has not been amended or approved by the House.



the enactment of the proposed legislation. It is estimated that there are approximately 3500 issued PVPA certificates that would remain subject to the present Act and the interpretation of section 2543 at issue here.<sup>32</sup> Those issued certificates include the leading soybean, cotton, wheat, and other PVPA-protected varieties currently being marketed and planted throughout the country. Thus, the legal issues presented by this case would remain of critical importance to American agriculture and the private seed breeding industry. See U.S. Petition Brief, at 19 ("decision below will have a continuing adverse impact on the breeders of novel varieties for years to come").

If the Federal Circuit's decision in this case remains controlling even just as to all issued PVPA certificates, many existing seed breeders may not be able to support or sustain their on-going research efforts long enough to benefit from the new amendments. The new varieties being introduced today are those for which the research was begun in the early 1980's. Similarly, any new varieties introduced over the next decade will be the result of the research programs of today. However, many of those on-going research programs are being severely curtailed or eliminated outright due to the inability of the PVPA to protect the investments necessary to support those programs. Thus, the benefits for farmers, breeders, and consumers from the PVPA can only be preserved by reversing the Federal Circuit's decision in this case, whether the proposed legislation is enacted or not.

Moreover, it will not necessarily be the seed companies that will be harmed the most by the Federal Circuit's

<sup>32</sup> In the first ten years of the PVPA, 798 plant variety protection certificates were issued. Chisum, § 1.05[2], at 1-274. By 1982, the number had risen to 174 certificates issued in a single year. *Id.* In 1993, 272 new plant variety protection certificates were issued. See J. Kraus, *Case Control in the Plant Variety Protection Act: Eradicating Asgrow*, 76 J. Pat. & Trademark Off. Soc'y 291, 291 & nn.3-4 (April 1994).

evisceration of the PVPA. Some seed companies may be able to redirect their research funds to hybrids and to asexually-reproduced plants protected by the Plant Patent Act. Some seed companies will be able to transfer their research and development efforts for new varieties to foreign countries which have greater and more enforceable legal protection for sexually-reproduced plants.<sup>33</sup> As research in novel varieties is shifted to other countries, it will be the American farmers who will be unable to compete effectively in the international agricultural market as foreign yields increase as a result of new and improved varieties not available in this country.

Congress understood that one form of protection (limiting unauthorized sales of PVPA seed) in the absence of the other (requiring notice on all transfers of PVPA seed) would not further the important purposes underlying the PVPA; however, the Federal Circuit plainly did not. The construction of section 2543 devised by the Federal Circuit allows up to half of a person's crop in a protected novel variety to be sold as seed and then exempts this immense quantity of seed sales from the notice requirements of section 2541(6). That illogical combination was never intended by Congress, defies the purposes of the PVPA, and is contrary to the explicit language of the Act.

If up to half (50%) of each crop of a protected variety produced on a farm can be sold as seed, a requirement that there be notice on all such sales will not overcome the crippling effects of the erroneous quantitative ruling. Similarly, if permissible seed sales under section 2543 are properly limited to the amount of seed needed to produce another crop on the farm, a failure to require that notice be given on such sales will likely place equally huge amounts of novel variety seed beyond the effective

<sup>33</sup> In countries adhering to UPOV provisions, there is no right to sell any quantity of protected seed without the authority of the owner. See UPOV, Art. 14(1).

enforcement reach of the certificate owner. Thus, if either aspect of the Federal Circuit's interpretation of section 2543 is left unaltered by this Court, the result will truly be "a travesty of statutory construction" (Pet. App. 32a) with immense negative consequences for American agriculture, farmers, and consumers.

### CONCLUSION

For the reasons stated above, the judgment of the Federal Circuit should be reversed in its entirety and the case remanded for further proceedings in accordance with the statute properly restored by this Court to the interpretation intended and enacted by Congress.

\_\_\_\_\_  
Respectfully submitted,

*Of Counsel:*

BRUCE STEIN  
SIDNEY B. WILLIAMS, JR.  
THE UPJOHN COMPANY  
7000 Portage Road  
Kalamazoo, Michigan 49001  
(616) 323-4000

LAWRENCE C. MAXWELL  
MARY ELLEN MORRIS  
TRABUE, STURDIVANT & DEWITT  
511 Union Street  
Nashville, Tennessee 37219  
(615) 244-9270

RICHARD L. STANLEY  
*Counsel of Record*  
JOHN F. LYNCH  
ARNOLD, WHITE & DURKEE  
750 Bering Drive  
Suite 400  
Houston, Texas 77057  
(713) 787-1400

*Counsel for Petitioner*  
*Asgrow Seed Company*

Date: June 10, 1994

## **APPENDIX**



**APPENDIX****7 U.S.C. § 2541. Infringement of plant variety protection**

Except as otherwise provided in this subchapter, it shall be an infringement of the rights of the owner of a novel variety to perform without authority, any of the following acts in the United States, or in commerce which can be regulated by Congress or affecting such commerce, prior to expiration of the right to plant variety protection but after either the issue of the certificate or the distribution of a novel plant variety with the notice under section 2567 of this title:

- (1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or possession of it;
- (2) import the novel variety into, or export it from, the United States;
- (3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or
- (4) use the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom; or
- (5) use seed which had been marked "Unauthorized Propagation Prohibited" or "Unauthorized Seed Multiplication Prohibited" or progeny thereof to propagate the novel variety; or
- (6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received; or
- (7) perform any of the foregoing acts even in instances in which the novel variety is multiplied other than sexually, except in pursuance of a valid United States plant patent; or
- (8) instigate or actively induce performance of any of the foregoing acts.

## 7 U.S.C. § 2543. Right to save seed; crop exemption

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.

## 7 U.S.C. § 2567. Limitation of damages: marking and notice

Owners may give notice to the public by physically associating with or affixing to the container of seed of a novel variety or by fixing to the novel variety, a label containing either the words "Unauthorized Propagation Prohibited" or the words "Unauthorized Seed Multiplication Prohibited" and after the certificate issues, such additional words as "U.S. Protected Variety". In the event the novel variety is distributed by authorization of the owner and is received by the infringer without such marking, no damages shall be recovered against such infringer by the owner in any action for infringement, unless the infringer has actual notice or knowledge that propagation is prohibited or that the variety is a protected variety, in which event damages may be recovered only for infringement occurring after such notice. As to both damages and injunction, a court shall have discretion to be lenient as to disposal of materials acquired in good faith by acts prior to such notice.



(14)  
No. 92-2038

Supreme Court, U.S.  
FILED

AUG 1 1994

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

ASGROW SEED COMPANY,  
*Petitioner,*  
v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

**BRIEF FOR THE RESPONDENTS**

WILLIAM H. BODE  
Counsel of Record  
LUIS M. ACOSTA  
WILLIAM H. BODE & ASSOCIATES  
1150 Connecticut Avenue, N.W.  
Ninth Floor  
Washington, D.C. 20036  
(202) 828-4100  
*Counsel for Respondents*  
*Denny Winterboer and*  
*Becky Winterboer*

50 pp



## QUESTIONS PRESENTED

Section 2543 of the Plant Variety Protection Act of 1970 ("PVPA" or "Act"), 7 U.S.C. § 2321 *et seq.*, provides that "without regard to the provisions of [Section 2541(3)] it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes . . . ." Section 2541(3) prohibits "sexually multiplying the novel variety as a step in marketing (for growing purposes) the variety." The questions presented are:

1. Whether a unanimous Federal Circuit panel erred in refusing to interpret Section 2543 to limit sales by a farmer to other farmers for reproductive purposes to, in the case of soybeans, 1/45th of the farmer's crop, thus eviscerating the farmer's exemption, in order to accommodate Asgrow Seed Company's perceived purposes of the Act, when the farmer's exemption reflects a compromise between the ancient right of farmers to sell seed to other farmers and the new rights afforded breeders.

2. Whether a unanimous Federal Circuit panel erred in refusing to read into the PVPA the requirement that qualified sales under the farmer's exemption include a notice that the seed is a protected variety, when Section 2543 explicitly provides for an exception from that requirement.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
STATEMENT OF THE CASE .....	1
A. The Alleged Infringement by the Winterboers....	3
B. The District Court Proceedings .....	5
C. The Opinion of the Federal Circuit .....	6
SUMMARY OF ARGUMENT .....	8
ARGUMENT .....	11
I. THE HOLDING OF THE FEDERAL CIRCUIT CONFORMS TO THE PLAIN LANGUAGE OF THE STATUTE .....	11
II. ASGROW'S INTERPRETATION OF THE FARMER'S EXEMPTION CANNOT WITH- STAND SCRUTINY .....	17
A. None of the Four Versions of the "Ensuing Crop Limitation" Proffered in This Case Ac- curately Construes the Farmer's Exemption..	17
1. Asgrow's Current Analysis Is Demon- strably Faulty, and Conflicts With Its Argument Before the Federal Circuit....	18
2. The Analysis of the United States Is Likewise Faulty .....	20
3. The Other Two Versions of the Ensuing Crop Limitation Appearing in This Liti- gation Also Are Defective .....	22
4. The Term "Marketing" in Section 2541(3) Contemplates Activities Other Than "Selling" .....	23

## TABLE OF CONTENTS—Continued

	Page
B. The Agencies Charged With Administering the Statute, the Judiciary, and Legal and Academic Commentators Agree With the Winterboers' Reading of the Farmer's Exemption .....	25
C. Despite Wide Acknowledgement of the Breadth of the Farmer's Exemption, Congress Did Not Amend the Farmer's Exemption in 1980 or in 1990 .....	30
D. Whichever Competing Limiting Interpretation Is Used the Result Is the Same—the Farmer's Exemption Is Eviscerated .....	31
E. Brown-Baggers Compete With Breeders on the Fringe of the Market and Pose No Serious Threat to Their Activities .....	32
F. Asgrow's "One Ensuing Crop" Limitation of the Farmer's Exemption Would Severely Penalize Vegetable Seed Growers, Who Commonly Save Five Years of Seed, and Otherwise Is Unenforceable .....	34
G. Important Public Policy Issues Support the Carefully Crafted Limitations by Congress in Enacting the PVPA .....	37
III. THE NOTICE REQUIREMENT OF SECTION 2541(6) DOES NOT APPLY TO SAVED SEED .....	41
CONCLUSION .....	43

## TABLE OF AUTHORITIES

CASES	Page
<i>Asgrow v. Kunkle Seed Co.</i> , No. 86-3138-A (W.D. La. April 1, 1987), <i>aff'd</i> , 845 F.2d 1034 (Fed. Cir. 1988) .....	27
<i>Blau v. Lehman</i> , 368 U.S. 403 (1962) .....	31
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 114 S. Ct. 1164 (1994) .....	32
<i>CBS, Inc. v. Federal Communications Commission</i> , 453 U.S. 367 (1981) .....	30
<i>Delta &amp; Pine Land Co. v. Peoples Gin Co.</i> , 694 F.2d 1012 (5th Cir. 1983) .....	7
<i>Diamond v. Chakrabarty</i> , 447 U.S. 303 (1980) .....	40
<i>Equal Employment Opportunity Commission v. Arabian American Oil Co.</i> , 499 U.S. 244 (1991) ..	27
<i>Greyhound Corp. v. Mt. Hood Stages, Inc.</i> , 437 U.S. 322 (1978) .....	21
<i>Immigration and Naturalization Service v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987) .....	27
<i>Mertens v. Hewitt Associates</i> , 113 S. Ct. 2063 (1993) .....	31
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U.S. 294 (1933) .....	27
<i>Pavelic &amp; LeFlore v. Marvel Entertainment Group</i> , 493 U.S. 120 (1989) .....	21
<i>Rodriguez v. United States</i> , 480 U.S. 522 (1987) ..	21
<i>Schreiber v. Burlington Northern, Inc.</i> , 472 U.S. 1 (1985) .....	21
<i>United States v. Rutherford</i> , 442 U.S. 544 (1979) ..	21
<i>West Virginia University Hospital v. Casey</i> , 499 U.S. 83 (1991) .....	27
<i>Women Involved in Farm Economy v. U.S. Dept. of Agriculture</i> , 876 F.2d 994 (D.C. Cir. 1989), <i>cert. denied</i> , 493 U.S. 1019 (1990) .....	22
FEDERAL STATUTES AND REGULATIONS	
7 U.S.C. § 2321 .....	i, 1
7 U.S.C. § 2541 .....	12
7 U.S.C. § 2541(1) .....	<i>passim</i>
7 U.S.C. § 2541(3) .....	<i>passim</i>
7 U.S.C. § 2541(4) .....	7, 12, 13



## TABLE OF AUTHORITIES—Continued

	Page
7 U.S.C. § 2541 (6) .....	3, 41, 42, 43
7 U.S.C. § 2543 .....	<i>passim</i>
7 U.S.C. § 2567 .....	42
17 U.S.C. § 107 .....	32
35 U.S.C. § 161 .....	40
Pub. L. No. 96-574, 94 Stat. 3350 .....	30
7 C.F.R. Part 97 .....	27

## MISCELLANEOUS

H.R. Rep. No. 888, 100th Cong., 2d Sess. (1988), <i>reprinted in ANIMAL PATENTS: THE LEGAL, ECONOMIC AND SOCIAL ISSUES</i> (William H. Lesser ed. 1989) .....	36, 40
<i>Proposed Amendments to the Plant Variety Pro- tection Act: Hearings Before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agricul- ture</i> , 101st Cong., 2d Sess. (1990) .....	29, 31
H.R. 13631, 91st Cong., 2d Sess. (1969) .....	19
Transgenic Animal Patent Reform Act, H.R. 4700, 100th Cong., 2d Sess. (1988) .....	36
C. S. Barnard & J. S. Nix, FARM PLANNING AND CONTROL (1973) .....	38
Jean-Pierre Berland and Richard Lewontin, <i>Breeder's Rights and Patenting Life Forms</i> , 322 NATURE 785 (August 1986) .....	38, 39
Jack Doyle, ALTERED HARVEST: AGRICULTURE, GENETICS, AND THE FATE OF THE WORLD'S FOOD SUPPLY (1985) .....	39
Cary Fowler, UNNATURAL SELECTION: TECHNOL- OGY, POLITICS AND PLANT EVOLUTION (forth- coming 1994) .....	39
Jack E. Houston <i>et al.</i> , <i>Uncertainty and Structural Issues Facing the Seed Handling Industry</i> , 4 AGRIBUSINESS 347 (1988) .....	28
Dan Kirkpatrick, <i>Enforcing the Letter of the Law</i> , SEED WORLD (Dec. 1991) .....	5

## TABLE OF AUTHORITIES—Continued

	Page
Jack R. Kloppenburg, Jr., FIRST THE SEED: THE POLITICAL ECONOMY OF PLANT BIOTECHNOLOGY (1988) .....	38
Bernard M. Leese, Jr., <i>U.S. Plant Variety Protec- tion Act and Its International Role</i> , 63 ACTA HORTICULTUREA 145 (Dec. 1976) .....	26
W. Lesser, <i>Modifications in Intellectual Property Rights Law and Effects on Agricultural Re- search</i> , in: U.S. AGRICULTURAL RESEARCH: STRATEGIC CHALLENGES AND OPTIONS (Robert D. Weaver ed. 1993) .....	40
Robert P. Merges, <i>Intellectual Property in Higher Life Forms: The Patent System and Contro- versial Technologies</i> , 47 MD. L. REV. 1051 (1988) .....	2, 39, 40
Richard K. Perrin, <i>Intellectual Property Rights in the Public Interest</i> , in U.S. AGRICULTURAL RE- SEARCH: STRATEGIC CHALLENGES AND OPTIONS (Robert D. Weaver ed., 1993) .....	37
<i>PVP Rights Should Be Enforced</i> , SEED INDUSTRY (Aug./Sept. 1991) .....	5
A. Allen Schmid, <i>Biotechnology, Plant Variety Protection, and Changing Property Institutions in Agriculture</i> , 7 N. CENT. J. AGRIC. ECON. 129 (Jul. 1985) .....	37
U.S. Congress, Office of Technology Assessment, NEW DEVELOPMENTS IN BIOTECHNOLOGY: PAT- ENTING LIFE (1990) .....	29
U.S. Department of Agriculture, Agricultural Marketing Service, Pub. No. PA-1191, PLANT VARIETY PROTECTION: HOW IT WORKS FOR YOU (June 1977) .....	26
Sidney Williams, <i>The Future of the Plant Variety Protection Act in the USA</i> , in FIFTH INTERNA- TIONAL COLLOQUIUM ON THE PROTECTION OF PLANT BREEDERS' RIGHTS (1987) .....	28

## TABLE OF AUTHORITIES—Continued

	Page
David Wood, <i>Crop Germplasm: Common Heritage or Farmers' Heritage? in SEEDS AND SOVEREIGNTY: THE USE AND CONTROL OF PLANT GENETIC RESOURCES</i> (Jack R. Kloppenburg, Jr. ed. 1988) .....	38
WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1961) .....	15

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1994

---

No. 92-2038

---

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

---

**BRIEF FOR THE RESPONDENTS**

---

**STATEMENT OF THE CASE**

This case raises the question whether a statutory exemption, contrary to its clear language, must be sacrificed in order to serve the asserted general purpose and intent of the statute containing it. Petitioner presumes, without support in the record or analysis, that the breeders' rights created by the Plant Variety Protection Act, 7 U.S.C. § 2321 *et seq.*, will be "destroyed" unless the right of farmers to sell seed for seeding purposes to other farmers, embodied in the farmer's exemption at 7 U.S.C. § 2543, is curtailed to the point of meaninglessness.

Respondents submit that the clear language of the exemption should be honored, and the decision of the Fed-



eral Circuit affirmed. The Federal Circuit's interpretation of the exemption is consistent with the interpretation by the Plant Variety Protection Office shortly after the 1970 promulgation of the Act; with the interpretation widely understood in the farming community as evidenced by numerous articles in the trade press explaining the PVPA; and with the interpretation of the exemption proffered to Congress in 1990 by Amicus the American Seed Trade Association when it asked that the farmer's exemption be narrowed to one crop. Had Congress been unhappy with this interpretation of the exemption, it could have amended the language on numerous occasions, including in 1980 when it made significant changes to other provisions of the PVPA, and in 1990 when it held extensive hearings on the Act.

The unsupported claims and policy arguments of Petitioner regarding the dire consequences attendant if the exemption is not eliminated are not relevant to the Court's task of statutory interpretation. The proper forum for these concerns is Congress, not this Court. The farmer's exemption reflects a political compromise that weighed the centuries-old right of farmers to save seed grown on their farms and dispense with it as they wish against the new rights of breeders in sexually reproducing plants. A review of the PVPA demonstrates that this was not an easy call; the PVPA is the only U.S. statute to convey intellectual property rights in self-reproducing subject matter.<sup>1</sup> Protecting an industry from competition was not undertaken lightly, particularly in the special situation of sexually reproduced plants.

Unlike holders of utility patents, a PVPA certificate holder need not meet the constitutional requirement of "non-obviousness." Indeed, an applicant need not even show its variety is an improvement over existing varieties.

<sup>1</sup> Robert P. Merges, *Intellectual Property in Higher Life Forms: The Patent System and Controversial Technologies*, 47 MD. L. REV. 1051, 1070 (1988).

The absence of any quality requirement in the PVPA registration system has permitted seed companies to "borrow" varieties developed by state research centers, to make functionally insignificant "cosmetic" changes, and, thereby, to obtain so-called "patent-like" protection.<sup>2</sup> When it is considered that farmers, by selective breeding spanning decades, are the source of the cultivars used by the state research centers, and that they often funded public research through special excise taxes, it does not seem inappropriate to grant them limited rights to sell PVPA protected seed grown on their own farm to other farmers.

#### A. The Alleged Infringement by the Winterboers

This case concerns two varieties of Asgrow soybean seed, designated by it as A1937 and A2234, which, for purposes of the pretrial motion before the District Court, Respondents conceded have received plant variety certificates from the Plant Variety Protection Office of the Department of Agriculture. Asgrow has alleged that the Winterboers infringed their PVPA certificates by 1) unauthorized selling of the two varieties (§ 2541(1)); 2) sexually multiplying the varieties as a step in marketing the varieties (§ 2541(3)); and 3) dispensing the varieties in a form in which they can be propagated without giving notice of their protected status (§ 2541(6)).

Becky and Denny Winterboer are the owners and operators of a small family farm in Clay County, Iowa. The Winterboers grow corn and soybeans. Their primary business is the growing of crops for sale as food and feed—that is, for non-reproductive purposes. (R39). Since 1987, the Winterboers have sold a portion of their seed to other farmers for seeding purposes, a common practice among farmers known as "brown-bagging." (R40). The

<sup>2</sup> Indeed, the Asgrow soybean varieties at issue here, A1937 and A2234, were derived from soybean varieties developed at state research centers. See May 7, 1992 Citation of Supplemental Authorities from William H. Bode to Panel, U.S. Court of Appeals for the Federal Circuit.



gross revenues which the Winterboers received from selling soybeans as seed have always accounted for less than 25% of their total farm income. (R39). In 1988, the income from the sale of seed sold for reproductive purposes was 23.5%, and in 1989, 21.5%, of total farm income. (R39; R43).

The Winterboers have never advertised that they have seed for sale. (R39). They have never utilized brokers, agents, or other third parties to effectuate the sales. (R40). Sales are made from bulk storage on the premises of the farm to people who are known to the Winterboers as farmers in the area, or by word of mouth to other farmers. (R40). In the 1990 crop year at issue in this case, the Winterboers sold less than half of each variety for which Asgrow was issued a certificate of plant protection.<sup>3</sup>

On December 28, 1990, Denny Winterboer received a call from a local farmer, Robert A. Ness, who as it turned out, was acting on behalf of Asgrow. (R40; R17). Although this was two months before the Winterboers' normal soybean seed selling season, and prior to the Winterboers' labels having been prepared, Mr. Ness requested to immediately purchase some bags of soybean. (R40). Mr. Ness did so and gave the purchased bags to Asgrow for testing. (R18).

Thereafter, on January 24, 1991, Asgrow filed a complaint against the Winterboers, seeking damages for alleged infringement of their certificates and a preliminary

<sup>3</sup> Denny Winterboer, at the preliminary injunction hearing, mistakenly testified that a majority of the soybeans grown from the two varieties of Asgrow seeds (as distinguished from the Winterboer's total soybean crop) was sold for reproductive purposes. In fact, the Winterboer's records indicate that of the 12,243 bushels of Asgrow A2234 seed harvested in 1990, 5,855 bushels were sold as seed, while of the 9,812 bushels of Asgrow A1937 seed harvested, 4,530 bushels were sold as seed. Because the appeal to the Federal Circuit was interlocutory, no final factual findings have been made on this issue.

injunction. As the Winterboers later discovered, this suit was part of a concerted campaign by Asgrow against farmers exercising their rights under the PVPA by selling seed to other farmers.<sup>4</sup> Unlike other farmers, however, the Winterboers refused to be intimidated and chose to stand and fight—at great financial and emotional costs.

#### B. The District Court Proceedings

On March 8, 1991, and March 26, 1991, the District Court conducted evidentiary hearings with respect to plaintiff's motion for preliminary injunction. By the latter date, defendants had completed the sale of all the soybeans in issue. The request for injunctive relief was thus moot for the 1991 growing season, and the parties entered into a stipulated order to that effect. Both sides filed motions for summary judgment on the liability issue in May 1991. After oral argument on July 19, 1991, the court, on September 30, 1991, issued a decision and order granting the plaintiff's motion for summary judgment and issuing a permanent injunction against the defendants' "selling seed in the method commonly referred to as 'brown bagging.'" Pet. App. at 24a.

The district court held that the Winterboers' seed sales to other farmers were not covered by the farmer's exemption. Stating that its primary obligation was to "interpret the statute in a manner which will dictate that the intent of Congress in enacting the PVPA will be accomplished," Pet. App. at 20a, the court held that it was necessary to read into Section 2543 a much more restrictive quantitative limitation on the amount of seed

<sup>4</sup> Asgrow has admitted bringing 18 such suits. At a symposium attended by plant breeders, Asgrow's attorneys offered to sell "litigation kits" to enable others also to sue farmers in order to cause them "headaches" and abandon their rights to sell to other farmers. Dan Kirkpatrick, *Enforcing the Letter of the Law*, SEED WORLD (December 1991); *PVP Rights Should Be Enforced*, SEED INDUSTRY (Aug./Sept. 1991).

that a farmer could save and then sell. The court concluded that Congress intended a farmer to sell only the amount of saved seed the farmer reasonably needed for the upcoming crop. Pet. App. at 21a-22a. "The exemption allows a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent crop year." Pet. App. 21a. While acknowledging that it had given a "restrictive reading of the exception," the court stated that such a reading was appropriate because it would further the Congressional objectives of promoting agricultural research and development. Pet. App. at 23a.

In accordance with its analysis of the quantitative limit which was to be read into Section 2543, the court stated that the Winterboers would be enjoined from selling seed, except for saved seed as the court had defined it, to other farmers, and from engaging in any form of "brown bagging." Pet. App. at 24a-25a.

### C. The Opinion of the Federal Circuit

Asgrow took an interlocutory appeal to the Federal Circuit. The appellate court rejected the District Court's construction of Section 2543, stating that "[t]he District Court erred in determining that the crop exemption of Section 2543 contains an ensuing crop limitation on the amount of seed a farmer can save." Pet. App. at 10a. The Court noted that the analysis of the District Court—that the phrase "for seeding purposes" modified the verb "save"—overlooked important phraseology within Section 2543. The Federal Circuit observed that "[r]eading the entire passage without critical omissions shows that 'for seeding purposes' modifies the verb 'obtained,' not 'saved.'" Pet. App. at 11a. Thus, the Court concluded, "section 2543 does not contain any explicit limit that a farmer can save and sell only as much seed as necessary to plant an ensuing crop." Pet. App. at 11a. The Federal Circuit correctly apprehended that no other

limitation existed in the first section of Section 2543 regarding the amount of seed that could be saved under the farmer's exemption. As did the Fifth Circuit in *Delta & Pine Land Co. v. Peoples Gin Co.*, 694 F.2d 1012 (5th Cir. 1983), however, the court perceived a number of constraints on sales by farmers under the farmer's exemption. In particular, the Federal Circuit read Section 2543 to contain a number of limitations. These include:

- a farmer remains subject to infringement under subsections 2541(3) and (4);
- a farmer may only save, use, or sell seed produced from or descended from seed obtained by authority of the PVPA certificate owner for seeding purposes;
- a farmer selling a novel variety must primarily grow crops from that seed for consumption;
- a farmer acquiring a novel variety must primarily grow crops from that seed for consumption;
- a farmer who acquires a novel variety in a brown bag sale can neither save nor sell seed harvested from that seed;
- the sale must comply with state laws; and
- a farmer cannot divert seed originally sold for consumption to planting purposes.

Pet. App. at 9a.

Reading the provisions of Section 2541(3) alongside Section 2543, the Federal Circuit also required that brown bag sales not constitute marketing. The Court defined "marketing" in the context of the PVPA to mean "extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet. App. at 12a-13a.

In its Opinion on Denial of Rehearing En Banc, the Court noted further that the terms "selling" and "market-



ing" are both used in Section 2541 in subparagraphs (1) and (3), respectively. This affirms, noted the Court, that in the PVPA "selling is different than marketing," indicating that more concerted activities were contemplated in Section 2541(3). Pet. App. at 29a.

### SUMMARY OF ARGUMENT

The unanimous panel of the Federal Circuit correctly parsed the provisions of Section 2543 of the Plant Variety Protection Act. Contrary to Petitioner's argument, there is no limitation on the right of farmers to save seed in the first section of the paragraph. The simple structure of Section 2543 entitles farmers to save seed descended from a protected variety except for the purposes of multiplication as a step in marketing. The farmer then may use the seed to produce a crop on his farm, or sell it for consumption in bona fide channels, or sell it in carefully delimited sales for reproductive purposes. With respect to the last option, Section 2543's second iteration of Section 2541(3)—excepting the farmer from liability for sexual multiplication of protected seed—contemplates sales by qualified farmers in excess of that necessary to replant the crop in the next season.

In contrast to this straightforward interpretation, the Petitioner presses a construction of the farmer's exemption that is contrived and result-driven. Asgrow argues that the reference to Section 2541(3) in Section 2543 means that a farmer who contemplates multiplying the protected variety as a step in marketing (for growing purposes) is limited to selling one crop, or in the case of soybeans, 1/45th of the farmer's harvest. To reach this result, two unstated premises are necessary. First, the term "marketing" must be synonymous with "selling." Second, the farmer's exemption must exclude sales to other farmers for both reproductive and nonreproductive purposes. Rather, these sales are deemed part of a separate "crop exemption" in Section 2543. The Court is

asked to accept this strained reading because, according to the Petitioner, the purposes underlying the statute demand it.

Asgrow's position raises a number of objections, any one of which is fatal by itself. Collectively, they are a serious indictment against Asgrow's litigation campaign against small farmers. These include the following:

- Asgrow's current version of the ensuing crop limitation is a recent revelation of the "proper" meaning of Section 2543; it was not advanced before either the district court or the appellate panel. Moreover, the analysis proffered by Petitioner before the Federal Circuit was different from that used by the District Court. How can a "proper" reading of the farmer's exemption result in so many conflicting interpretations?
- The interpretation of the Federal Circuit was the interpretation given of the farmer's exemption by the Plant Variety Protection Office after promulgation of the PVPA, and by the USDA itself. It is also the interpretation widely understood by the farming industry as evidenced by numerous articles in the trade press.
- Congress, fully aware of the interpretation of the PVPA by the USDA, did not see fit to amend the farmer's exemption in 1980, when substantial amendments were made to other parts of the PVPA. Nor did it in 1990, after the American Seed Trade Association, an Amicus Curiae here, testified that the farmer's exemption was too broad and should be limited to a farmer's ensuing crop.
- Vegetable farmers commonly save enough seed to grow four or five crops. Petitioner's interpretation would severely impact their operation and raise their costs. Moreover, the determination of what constitutes one crop would lead to difficult enforcement problems, as the District Court recognized.



- As a practical matter, "brown baggers" are not in competition with the seed breeders. Their seed is perceived as an inferior "discount" seed. The lower prices which these "price takers" receive for their seed reflects this fact. Farmers are unlikely to entrust their livelihood to this unproven seed, particularly when they cannot expect to be reimbursed for a failed crop.
- The linchpin of Asgrow's argument is that the terms "marketing" and "selling" are synonymous, but the separate treatment at Sections 2541(1) and 2541(3) of these words establishes that they have independent meanings.
- Asgrow's interpretation guts the farmer's exemption. In the case of soybeans, sales under the farmer's exemption would be limited to 1/45th of a crop. Yet the Court has long recognized that exceptions in statutes deserve their own life even if, by their nature, they work against the broader general purposes of the underlying statute.

In actuality, Petitioner's latest interpretation, just as its earlier interpretations, rests on the unstated premise that the literal reading of the PVPA must be ignored, and the farmer's exemption sacrificed, in order to further the interests of plant breeders and the nation. This premise is unsupported by the record and quickly dissolves under scrutiny.

The PVPA reflects a political compromise between the centuries-old right of farmers to sell seed to other farmers for seeding purposes on the one hand, and new property rights to be afforded plant breeders on the other. The compromise reflects the fact that cultivars presented to the PVPA by plant breeders for certification need not even represent an improvement over existing varieties. Rather, plant variety protection certificates may be granted for varieties which are only cosmetically different from the cultivars developed by small farmers over dec-

ades, and which have been refined by state seed research institutions financed in part by excise taxes on farmers. In essence, the PVPA presented an opportunity for multinational pharmaceutical and chemical companies, who have taken over most private breeding firms, to monopolize plant germplasm after making only negligible alterations to it. With an appreciation, however, of the practical problems of farmers who have to cope with intellectual property rights over their primary source of livelihood, Congress struck a balance by providing for the farmer's exemption. This compromise should not be disturbed by this Court.

## ARGUMENT

### I. THE HOLDING OF THE FEDERAL CIRCUIT CONFORMS TO THE PLAIN LANGUAGE OF THE STATUTE.

The decision of the Federal Circuit fundamentally conforms to the language and purposes of the PVPA and its farmer's exemption. Ultimately, the PVPA is a political compromise balancing farmers' interests in traditional and accepted farming practices against unprecedented "patent-like" protection for developers of sexually reproducing plants. In striking this balance, Section 2543 provides a farmer the right to save seed produced from a protected variety, and corollary rights to use the seed on his or her farm or to sell it for reproductive or non-reproductive purposes as specifically provided.

Section 2543 imposes no restriction on the amount of seed a farmer can *save*. The reference in the introductory "except" clause to Section 2541(3) does restrict the *purpose* for which a person can save the seed—a farmer cannot save it for the purpose of "sexually multiply[ing] the seed as a step in marketing (for growing purposes) . . . ." The second part of Section 2543, after the "provided" clause, allows a person whose "primary farming occupation is the growing of crops for sale for

other than reproductive purposes" to sell any seed he or she has saved to other farmers similarly engaged. The only quantity limitation, either explicit or implicit, in either part of Section 2543, is the implicit limitation requiring "the primary farming occupation" of the seller to be the "growing of crops for other than reproductive purposes." As long as the farmer has sold less than 50 percent of his or her crop for reproductive purposes, it can safely be presumed that his or her primary farming occupation "is the growing of crops for other than reproductive purposes."

Asgrow's and the amici's varying arguments that the reference to Section 2541(3) somehow limits the quantity of seed that can be saved are unsound. It limits only the purpose for which seed can be saved, not the quantity. Because the second part of Section 2543 expressly disclaims the applicability of Section 2541(3), it does not in any way limit the amount of saved seed that can be sold by one whose "primary farming occupation is the growing of crops for sale for other than reproductive purposes."

This conclusion is inevitable when the statute is examined in detail. The exemption under Section 2543 provides for a farmer's right to save otherwise protected seed and exempts certain uses of this seed from the infringement provisions of Section 2541. As to the right to save seed, the section states in relevant part:

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to *save seed* produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided . . . .

7 U.S.C. § 2543 (emphasis added). This language provides the crucial right to save seed, and as the Federal Circuit recognized, it is unmodified as to the quantity of seed that may be saved. Pet. App. at 6a. Even Asgrow recognizes that seed may be saved without limit. See Pet. Br. at 17-18. However, the leading phrase of the section places restrictions on this right. A farmer may save any quantity of seed as long as it is not for the purpose of sexually multiplying the protected seed as a step in marketing it for growing purposes<sup>5</sup> or for producing a hybrid. Additionally, the farmer has two corollary rights with respect to this saved seed: to use it on his or her farm or to sell it under the conditions set forth in the second part of Section 2543.<sup>6</sup> The first corollary right to use it on the farmer's own farm is not at issue in this case.

With respect to the second corollary right, the second part of Section 2543, after the italicized "*Provided*," sets forth the conditions for a narrow class of permitted sales for reproductive purposes:

*Provided*, That without regard to the provisions of Section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to

<sup>5</sup> As seen, Section 2543 begins, "[e]xcept to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, . . . ." Section 2541 defines infringement under the PVPA. Subsection (3) of 2541 prohibits one from sexually multiplying protected seed as a step in marketing it for reproductive purposes. Contrary to Asgrow's claim, this subsection does not impart a quantity limit on the amount of seed that can be sold; it merely restricts the purpose for which one can use the seed. Subsection § 2541(4) is not at issue in this case.

<sup>6</sup> Likewise, the Federal Circuit held, "the crop exemption allows those farmers who may save seed to use it to produce a crop on their own farm or to sell it under limitations within the exemption." Pet. App. at 7a.



other persons so engaged, for reproductive purposes, provided such sale is in compliance with [applicable] State laws. . . .

7 U.S.C. § 2543. This language provides an exception for a narrow class of sales. It allows *only* farmers whose primary farming occupation is the growing of crops for nonreproductive purposes to sell saved seed to other farmers who likewise do not grow crops primarily for reproductive purposes. Pet. App. at 7a-8a. Only this limited class of sales may be for reproductive purposes. Additionally, these sales must conform to any applicable state laws.

It is the quantity of saved seed salable under this portion of Section 2543 that is at issue in this case. Petitioner maintains that the first iteration of Section 2541(3) in Section 2543 limits this quantity to that amount needed for replanting the farmer's crop for the next season; any amount in excess of such quantity would necessarily be a quantity sexually multiplied as a step in marketing it for reproductive purposes. Pet. Br. at 22. Subsection 2541(3) prohibits this kind of sexual multiplication. However, the plain language of Section 2543 contains no such limitation. Section 2543's simple structure is as follows: (1) a farmer may save seed descended from protected seed except for the purpose of sexual multiplication as a step in marketing it for reproductive purposes; (2) that farmer may use the seed on the farmer's own farm or sell it subject to certain limits; and (3) a specified class of sales for reproductive purposes is exempt from liability under Section 2541(3). Nothing about this structure or the section's language entails anything like petitioner's quantity limit. In fact, Section 2543's second iteration of Section 2541(3)—excepting the farmer from liability for sexual multiplication of the protected seed—connotes that a farmer may sell for reproductive purposes saved seed in a quantity *in excess* of that necessary to replant the crop in the next season. *Multiplication* implies

reproduction in a greater than a one-to-one relation,<sup>7</sup> and it is multiplication that the second iteration of Section 2541(3) exempts.<sup>8</sup> This right is not unlimited, however.

The section places several conditions on this exemption for a limited class of sales for reproductive purposes. The primary farming occupation of both the selling and buying farmer must be the growing of crops for other than reproductive purposes. Attributing "primary" with its customary definition, the Federal Circuit held that a farmer, thereunder, can "sell less than half of the crop grown from the specific novel variety as brown bag seed." Pet. App. at 8a. Thus, these limits on both ends of the sales transaction preclude a widespread and systematic operation from directly competing with the certificate holder. For example, a farmer cannot sell seed produced from protected varieties for reproductive purposes as the farmer's primary farming occupation. Because of the structure of the exemption, such a "farmer" could neither sell nor purchase any brown bag seed. Furthermore, a farmer cannot participate in large scale indirect competition with the certificate holder by selling brown bag seed to a marketing operation, such as a seed wholesaler, engaged in selling such seed.<sup>9</sup> In all, the exemption protects the

<sup>7</sup> Multiplication is defined as the "act or process of multiplying, or increasing in number." WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1610 (2d ed. 1961) (emphasis added).

<sup>8</sup> Indeed, petitioner seems particularly concerned with this multiplied quantity. *E.g.*, Pet. Br. at 22. However, it is sales of saved seed in precisely such multiplied quantities that the second iteration of § 2541(3) exempts.

<sup>9</sup> The structure of Section 2541 reinforces this construction. It separately prohibits sales of the protected variety and its sexual multiplication as a step in marketing it for growing purposes. 7 U.S.C. § 2541(1) & (3). Of course, Subsection 2541(1)'s prohibition against sales of the protected variety is sufficient in and of itself to prevent all sales of it, whether for reproductive or nonreproductive purposes. Therefore, the independent proscription against



certificate holder from direct competition by large scale farmers and from marketing operations. It allows only relatively small scale, informal sales from one farmer whose primary use of such produced seed is for nonreproductive purposes to other such farmers.<sup>10</sup> Lastly, these sales must conform to state laws governing seed sales.

The third part of Section 2543 provides an exemption for sales of saved seed for nonreproductive purposes. This section provides in relevant part:

A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement.

7 U.S.C. § 2543. Under this portion of Section 2543, anyone may sell saved seed for nonreproductive purposes without infringing a certificate holder's rights.

This simple construction gives effect to all words and purposes of Section 2543 and imparts significance to its two references to Section 2541(3). In conferring the right to save seed, the first portion of Section 2543 exempts farmers from liability under Section 2541 by allow-

sexually multiplying the seed as a step in marketing it for reproductive purposes contemplates a broader range of activities. The proscription, for example, precludes a farmer from entering a service contract to produce seed from a protected variety for a marketing operation competing with the certificate holder.

<sup>10</sup> The structure of the PVPA and the farmer's exemption precludes a farmer from large scale direct competition with the certificate holder because such farmer would always have to use the majority of his or her crop for nonreproductive purposes. A farmer's investment and operation will always be constrained by the nonreproductive purposes to which the farmer can put such a crop.

ing them to save seed as long as it is not saved for purposes of sexual multiplication as a step in marketing it for reproductive purposes. Thus, the first iteration makes it clear that, in spite of the Section 2543 exemption, a farmer may be liable under Subsection 2541(3) for sexual multiplication as a step in marketing for reproductive purposes. The second part of Section 2543, with the second iteration of Section 2541(3), exempts from Section 2541(3) liability *only* that class of sales from a farmer whose primary farming occupation is the growing of crops for nonreproductive purposes to another such farmer. The second iteration applies, therefore, to a narrower class of sales than the overall Section 2543 exemption. Without this second iteration, these sales would still be subject to Section 2541(3) liability. Lastly, Section 2543 allows more liberal sales of saved seed for nonreproductive purposes. This straightforward construction gives effect to all words and purposes of the section without Asgrow's conjured notions of a quantity limit.

## II. ASGROW'S INTERPRETATION OF THE FARMER'S EXEMPTION CANNOT WITHSTAND SCRUTINY.

Asgrow asks the Court to accept a contrived interpretation of a statute to preserve its rendition of statutory intent. Asgrow's effort to obtain legislative relief from this Court should be rejected.

### A. None of the Four Versions of the "Ensuing Crop Limitation" Proffered in This Case Accurately Construes the Farmer's Exemption.

Asgrow asserts that the "ensuing crop limitation" flows naturally from the statutory language of the PVPA. Pet. Br. 17. Oddly, however, in this single case, there have been four separate versions of statutory interpretation used to to derive the "ensuing crop limitation." Asgrow's current version of the ensuing crop limitation differs from the version adopted by the District Court, from the version Asgrow pressed before the Federal Circuit, and from

the version proffered before this Court by the Solicitor General. This fact alone shows how the imputed quantity limitation tortures the statutory language. Furthermore, not one of the four versions of the "ensuing crop limitation" is convincing.

**1. *Asgrow's Current Analysis Is Demonstrably Faulty, and Conflicts With Its Argument Before the Federal Circuit.***

Asgrow's position is summarized as follows in its brief:

Through that initial incorporation of the terms of section 2541(3), the first sentence of section 2543 does not apply where a person has sexually multiplied a novel variety as a step in marketing. . . . At most, only the quantity of PVPA seed that was sexually multiplied *not* as a step in marketing the variety for growing purposes can be permissibly sold under . . . section 2543. That limited amount is the portion of the farmer's crop that he retains for use in the production of a crop on his farm. Moreover, it is the only portion of the crop produced to which the provision allowing a farmer to "sell such saved seed" under certain conditions even applies.

Pet. Br. at 13.

Asgrow's analysis turns on the proposition that "saved seed" may be used by a farmer for only one purpose—in the production of one crop for use on his farm. Thus, when a farmer intends to sexually multiply a protected variety, thereby disqualifying as "saved seed" that portion of the farmer's crop (and thereby infringing the certificate), the only purpose left is "the production of a crop for use on his farm." In the case of soybeans, the production of a crop consumes 1/45th of the farmer's harvest. Thus, Asgrow's newly found analysis is dependent upon a reading of Section 2543 pursuant to which the phrase "or for sale as provided in this section" is written out of the farmer's exemption. When sales offending Section

2541(3) are contemplated, the amount of saved seed which can be used, by default, is that amount needed to grow one crop.

Contrary to this analysis, however, this is not the "only portion of the crop produced" which may be sold as saved seed under the provision. After the phrase "or for sale as provided in this section" of Section 2543, sales involving *two* distinct purposes are considered. First, the provision contemplates sales by farmers whose primary occupation is farming to others so engaged. Second, the provision contemplates sales "for other than reproductive" (consumption) purposes in channels usual for such purposes. In short, under Section 2543 a farmer may save seed produced from a protected variety, without any quantitative limits, and he or she may use "such saved seed" for any of three purposes: production of an ensuing crop on his or her farm; sales to other farmers for reproductive purposes; or sales for non-reproductive purposes in the usual channels.

*When all of the language of Section 2543 is considered, a farmer does not default to one crop upon contemplating multiplication as a step in marketing. Rather, he or she still may use "such saved seed" (a) in qualifying sales for reproductive purposes to other farmers, and (b) in bona fide sales for non-reproductive purposes.*

It is clear that Congress recognized that seed could be saved for non-reproductive sales, as well as for reproductive sales. Before the final version of Section 2543 was passed by Congress, there was a separate "Crop Exemption" which provided that seed obtained "by saving seed" could be sold for "food, feed, in manufacture or the like." H.R. 13631, 91st Cong., 2d Sess. § 114 (1969). Indeed, before the district court, Asgrow explicitly recognized that farmers may save seed for use on their farms for sale as grain, or for sale as seed (reproductive purposes):



[U]nder 7 U.S.C. § 2543, a farmer may "save seed" produced by him from seed obtained by authority of the variety owner and use the "saved seed" in the production of a crop for use on his farm or for sale as grain. The farmer may sell such "saved seed" to another farmer if he decides, for some reason, not to use some or all of his "saved seed."

Asgrow Memorandum in Support of Motion for Summary Judgment, May 22, 1991, at 6.

This statement conflicts with the analysis to which Petitioner now subscribes. Upon violating Section 2541(3) by sexually multiplying the variety as a step in marketing (for growing purposes), or upon contemplating such a violation, the saved seed is not automatically limited to one crop. Rather, the farmer may save seed for the other two uses, namely, in qualified sales to other farmers for reproductive purposes and in bona fide channels for non-reproductive purposes. Sales by farmers whose principal occupation is farming to other such farmers is thus permitted, "without regard to the provisions of Section 2541(3)." Thus, as explained by the Federal Circuit, so long as proscribed marketing practices are not undertaken, the farmer may multiply the seed for reproductive purposes.

## 2. *The Analysis of the United States Is Likewise Faulty.*

The Solicitor General essentially proceeds on the same path as Petitioner, but with a different twist. At page 14 of his brief, the Solicitor General states, correctly, that the farmer may "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section." 7 U.S.C. § 2543. Then, in a surprising non sequitur, in the very next sentence the Solicitor General fails to give any import to the phrase "or for sale as provided in this section": "In other words, the farmer may use seed that has been produced from protected seed, and then saved, for the purpose of producing another crop." Sol. Gen. Br. at 14.

But what happened to the phrase "or for sale as provided in this section" (*i.e.*, to other farmers whose principal occupation is farming, and bona fide sales for non-reproductive purposes)? Inexplicably, the Solicitor General argues that such sales apply only to *subsequent* crops by the farmers!

Thus, although the ensuing *crop* may either be used on the farm or be sold to others, the use of the "saved seed" itself that is permitted by the opening clause of Section 2543 is limited to the "production of a crop."

Sol. Gen. Br. at 14 (emphasis in original). Thus, like magic, Section 2543, which never before contained any limits on the quantity of seed which may be saved and sold under the farmer's exemption, is now limited, in the case of soybeans, to 1/45th of the farmer's crop.

The Solicitor General's argument ignores that the first responsibility of a court in interpreting a statute is to analyze the language of the statute, and not to rewrite it to conform to perceived purposes. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985) (the "starting point" of statutory interpretation is "language of the statute"); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). The courts should not reinterpret statutes on the premise that they can better express the Congressional purpose. *United States v. Rutherford*, 442 U.S. 544, 555 (1979) ("federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with . . . public policy"); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

Virtually every exemption to a law by definition works against the "primary" purpose of the statute. This does not mean that the exemption should be sacrificed. As this Court has noted, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-



26 (1987); *see also West Virginia University Hospital v. Casey*, 499 U.S. 83, 98 (1991) ("the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone."); *Women Involved in Farm Economy v. U.S. Dept. of Agriculture*, 876 F.2d 994, 1002-03 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) ("district court's approach—focusing only on the overall purpose of the statute and disregarding the purpose of the [statutory] limitation—was quite artificial.").

**3. The Other Two Versions of the Ensuing Crop Limitation Appearing in This Litigation Also Are Defective.**

A third version of the "ensuing crop limitation" appears in the District Court's order. The District Court, in order to reach the result it felt was consistent with the general purpose of the PVPA, edited out crucial portions of Section 2543 to imply that the phrase "for seeding purposes" modifies the term "save seed":

The language of the statute is that, "it shall not infringe any right hereunder for a person to *save seed produced by him . . . for seeding purposes* and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section . . . ."

Pet. App. at 21a (emphasis in original). All parties apparently now agree that the District Court's version of the ensuing crop limitation was flawed. As pointed out by the Federal Circuit, the phrase "for seeding purposes" modifies the word "obtained," not the word "saved." Pet. App. at 11a-12a.

Another version of the ensuing crop limitation appears in Asgrow's brief before the Federal Circuit. There, Asgrow maintained that Section 2543 should be broken into two parts, an on-farm seed use exemption and an off-farm seed use exemption. The former, Asgrow argued,

applies where the farmer either uses the crop produced from the saved seed on his farm or sells it for non-reproductive use. The latter applies where a qualified farmer sells to another for reproductive purposes, and the sale is made from "saved seed." Because the term "saved seed" must have the same meaning in both parts of Section 2543, Asgrow argued, the farmer should not be allowed to sell any more under the off-farm exception than pursuant to the on-farm exemption, namely, the amount of seed used in planting next year's crop. Presumably, the awkwardness of this version of the ensuing crop limitation persuaded Asgrow to abandon it upon seeking en banc review before the Federal Circuit.<sup>11</sup>

In total, there have been four versions of the "ensuing crop limitation." If this limitation flowed from a natural reading of the statute there would not be four separate permutations of statutory interpretation used to reach the limitation.

**4. The Term "Marketing" in Section 2541(3) Contemplates Activities Other Than "Selling."**

The linchpin of Asgrow's argument (and that of the Solicitor General) is that the term "marketing" in Section 2541(3) must be defined to encompass selling. Unless marketing includes selling, the one crop limitation cannot be invoked and the analysis fails. Both Asgrow and the Solicitor General insist that the term be accorded its "ordinary, common meaning," *i.e.*, "marketing encompasses selling."<sup>12</sup> Pet. Br. at 20; Sol. Gen. Br. at 12.

<sup>11</sup> In its Petition for Certiorari, Asgrow acknowledged that its current statutory approach differs from that before the Federal Circuit panel. Pet. at 10 & n.10.

<sup>12</sup> The Solicitor General cites in footnote 10 of his brief instances in other statutes where marketing means selling. In each cited instance, however, the term "marketing" was explicitly defined in that statute for its particular purposes. No such definition is present in the PVPA.

The Federal Circuit correctly dealt with this contention. First, the Court noted that Asgrow's interpretation is so expansive that it "would swallow the entire crop exemption." Pet. App. at 12a. The provisions of Section 2543 permitting qualified farmers to sell to other farmers for reproductive purposes would *always* run afoul of Section 2541(3), thereby rendering the exemption meaningless. Second, in its opinion rejecting rehearing, the Court noted that since "selling" a protected variety is treated in Section 2541(1), the use of "marketing" in Section 2541(3) indicates that a different meaning was intended. Third, the Court's definition is a natural reading of the statute that gives life to all of the provisions of the farmer's exemption. Congress assuredly wished to prohibit attempts by persons to avoid the prescriptions of the PVPA by entering into contracts with farm cooperatives, cotton gins, middlemen, and other agents to multiply protected seed. Thus, the Federal Circuit held that "marketing" in the context of the PVPA "means extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet. App. 12a-13a.

The phrase, "[t]hat without regard to the provisions of Section 2541(3)" preceding "it shall not infringe any right hereunder for a person whose primary occupation . . ." is given a practical meaning by the Court. This portion of Section 2543 clarifies that direct sales by qualified farmers to other qualified farmers do not constitute marketing activities prohibited under the PVPA. Of course, the farmer remains subject to these marketing proscriptions.

Finally, under the Winterboers' analysis, even if the meaning of "marketing" is extended beyond its natural limit (to include selling), there is still no ensuing crop limitation. If we assume that the term "marketing" includes selling, persons whose principal occupations are the growing of seed for non-reproductive purposes may

sell to other similarly situated farmers "without regard to the provisions of Section 2541(3)." Stated differently, whatever the constraints contained in the term "marketing," they do not apply to those who primarily are farmers. All others, however, remain bound by these constraints by the first iteration of Section 2541(1) in Section 2543.

**B. The Agencies Charged With Administering the Statute, the Judiciary, and Legal and Academic Commentators Agree With the Winterboers' Reading of the Farmer's Exemption.**

Asgrow's assertion that the "ensuing crop limitation" is consistent with the express wording of Section 2543 also is belied by the fact that prior to this litigation, virtually all published comment on the PVPA, including that of the Plant Variety Protection Office and the United States Department of Agriculture, interpreted the farmer's exemption to allow sales for reproductive purposes between buyers and sellers who are both primarily farmers without the one crop limitation.

The PVPA is administered by an office within the Department of Agriculture, the Plant Variety Protection Office ("PVPO"). In a 1973 interpretation, S.F. Rolling, then Commissioner of the PVPO, stated:

There is no limitation as to the amount of sales permitted a grower under section 113 of the Act except to the extent it may affect his "primary farming occupation" classification upon which the exemption is based. The courts will have to decide what is a farmer's primary farming occupation.

(JA13). The PVPO thus made clear that it is the "primary farming occupation" language, not the "saved seed" language, that is the focus of the farmer's exemption.<sup>13</sup>

<sup>13</sup> The Solicitor General seeks to downplay the significance of the Commissioner's 1973 interpretation. Sol. Gen. Br. at 15 n.12. Contrary to the Solicitor General's analysis, however, the fact that



Similarly, an employee of the Department of Agriculture in 1976 stated that the farmer's exemption "permits an authorized grower to use and sell his reproduced seed to another grower provided neither is in the seed business." Bernard M. Leese, Jr., *U.S. Plant Variety Protection Act and Its International Role*, 63 ACTA HORTICULTUREA 145, 148 (Dec. 1976).

Likewise, in a publicly distributed informational pamphlet published in 1977, the Department of Agriculture described the farmer's exemption in the following manner:

The PVPA specifies that seed of a protected variety may be used by a grower whose primary occupation is the growing of crops for food or feed and not primarily the growing of crops for seeding purposes. A grower who has obtained the seed with the authority of the Certificate owner may use the seed to grow a crop and save the seed which results from that crop. *The grower may also sell the reproduced seed to a second grower whose primary occupation is growing crops for food or feed.*

U.S. Department of Agriculture, Agricultural Marketing Service, Pub. No. PA-1191, PLANT VARIETY PROTECTION: HOW IT WORKS FOR YOU 6-7 (June 1977) (emphasis added). There is no mention of the ensuing crop limitation; the only limitation noted by USDA is that the primary occupation of both the first and second grower must be the growing of crops for food or feed. These early administrative interpretations, representing the agencies' first attempts at construing a new regulatory concept, are

the Commissioner does not discuss the marketing prohibition of Section 2541(3) merely confirms that sales between parties whose primary occupations are farming are not prohibited. The Solicitor General's suggestion that there might have been a view within the USDA on the farmer's exemption separate from the view of the PVPO Commissioner, the highest officer in the USDA dealing solely with the PVPA, strains credulity.

entitled to heightened deference. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).<sup>14</sup>

The American Seed Trade Association urged the USDA in 1987 to issue regulations to embrace the "one-crop" limitation. The USDA declined, correctly noting that it did not have the power to accomplish this result by regulation. (JA20). One can assume that the agency determined it lacked the authority to issue such a "clarifying" regulation because such a regulation would have been completely opposite the plain language of the statute; after all, the agency has issued extensive regulations governing other aspects of the PVP regime. See 7 C.F.R. Part 97.

The judicial branch, in the only decision prior to this litigation concerning how much seed a farmer can sell under the farmer's exemption, also read the farmer's exemption broadly. In *Asgrow v. Kunkle Seed Co.*, No. 86-3138-A (W.D. La. April 1, 1987), *aff'd*, 845 F.2d 1034 (Fed. Cir. 1988) (table), it was determined that the farmer's exemption allowed a farmer to sell up to 49% of his or her crop as seed, that is, as long as the farmer's primary occupation was farming.

In addition to both the executive and judicial branches having read the farmer's exemption to allow sales between farmers as long as neither are in the seed business, most published legal and academic commentators have agreed. One commentator of particular note is Sidney Williams, Counsel for Upjohn, who appears as counsel for Upjohn's

<sup>14</sup> According to the Solicitor General's brief, the USDA now supports *Asgrow's* interpretation of the farmer's exemption, despite the USDA's numerous prior representations adopting a less strained reading of the exemption. Sol. Gen. Brief at 15 n.12. Where administrative agencies have been inconsistent in their interpretation of a statute, their views are entitled to less deference. See *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244, 257-58 (1991); *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).



subsidiary, Asgrow, before this Court. At a 1987 conference, Mr. Williams described the farmer's exemption as follows:

The so-called "Farmers Exemption" is set forth in 7 USC 2543 and it allows a farmer to do the following with a protected variety obtained on authority from the certificate owner without infringing the certificate:

- (1) Save the seed or seed descended from such seed for production crops for use on his farm or for sale.
- (2) Save the seed from a crop produced from the seed for future use or sell [*sic*] on the farm.
- (3) To sell the seed to others who will use it for the purpose of producing crops for sale.

Sidney Williams, *The Future of the Plant Variety Protection Act in the USA*, in FIFTH INTERNATIONAL COLLOQUIUM ON THE PROTECTION OF PLANT BREEDERS' RIGHTS (1987). Mr. Williams' 1987 understanding of the farmer's exemption did not involve any quantitative limit on the right to save or sell seed, or any "ensuing crop limitation"; rather, Mr. Williams noted that the exemption "allows a farmer . . . to sell the seed to others who will use it for the purpose of producing crops for sale."

Other commentators have observed that the farmer's exemption allows limited competition by farmers with seed companies in the sale of PVPA-protected seed. Thus,

so long as the crop farmer's primary farming occupation remains growing crops for uses other than for seed purposes [, the farmer] can engage in a part-time seed business, competitive with another local handler, without incurring the expense of a royalty payment to the owner-inventor of a certified seed variety.

Jack E. Houston *et al.*, *Uncertainty and Structural Issues Facing the Seed Handling Industry*, 4 AGRIBUSINESS 347,

349 (1988). The Office of Technology Assessment of the United States Congress concurs:

The farmer's exemption provision of PVPA . . . allows farmers to retain protected seed for planting and for sale to others whose principal occupation is also farming. . . . In effect, farmers can compete, to a limited degree, directly with the seed industry that developed the variety, as long as the primary occupation of the farmer is production agriculture.

U.S. Congress, Office of Technology Assessment, *NEW DEVELOPMENTS IN BIOTECHNOLOGY: PATENTING LIFE* 79 (1990).

Of all the commentators acknowledging the right of farmers to sell seed to others as long as both parties primarily are engaged in farming, perhaps the most authoritative is the testimony of the organization that authored the original PVPA bill, the American Seed Trade Association. In 1990, testifying before a Subcommittee of the House Committee on Agriculture in a hearing on recommended amendments to the PVPA, the president of the ASTA stated:

Unfortunately, the [farmer's] exemption as enacted allows any person "whose primary farming occupation is the growing of crops for sale" to sell the seed to others so engaged. This unfortunately overbroad wording can be and has been applied to sales far more damaging to seed developers than simple over-the-fence sales among neighbors.

*Proposed Amendments to the Plant Variety Protection Act: Hearings Before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 101st Cong., 2d Sess. 27 (1990) (Statement of Jerome J. Peterson, President, American Seed Trade Association). Now that it is before the Supreme Court, however, the ASTA maintains that the language of the farmer's exemption "compels an interpretation limiting the amount of protected seed a farmer

may sell to the amount saved to grow another crop." ASTA Amicus Br. at 5.

In contrast to this wide body of authority—the Executive, the Judiciary, scholarly commentators, and the trade association that wrote the original draft of the PVPA—Asgrow has failed to quote a single source outside the context of this litigation that has read the farmer's exemption in a manner consistent with the "ensuing crop limitation." Yet Asgrow insists that its proffered limitation is consistent with "the express wording of the statute." Pet. Br. at 17. The fact that only Asgrow is capable of discerning this reading of the "express wording" should give the Court pause.

**C. Despite Wide Acknowledgement of the Breadth of the Farmer's Exemption, Congress Did Not Amend the Farmer's Exemption in 1980 or in 1990.**

Despite the broad recognition since the 1970 passage of the PVPA that the farmer's exemption broadly allows sales of seed for reproductive purposes between persons whose primary occupation is farming, Congress has not chosen to amend the farmer's exemption. This suggests that the widely-held understanding of the breadth of the exemption comports with Congressional intent.

Congress has had ample opportunity to amend the exemption. In 1980, the PVPA was significantly amended to include certain previously excluded crops and to extend the length of protection from 17 to 18 years. Pub. L. No. 96-574, 94 Stat. 3350. Despite these extensive changes, and despite the generally accepted understanding of the farmer's exemption, Congress made no effort to change the farmer's exemption. Congress' decision to change parts of the statute but leave the farmer's exemption intact indicates that Congress did not disagree with the generally accepted understandings and administrative interpretations of the exemption. See *CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367, 385 (1981).

Likewise, as noted above, in extensive hearings before Congress in 1990, the ASTA brought its concerns about the farmer's exemption to Congress. See Statement of Jerome J. Peterson, *supra* p. 29. Despite clearly being placed on notice of the ASTA's unhappiness with the farmer's exemption, Congress took no action to amend the Act. Again, Congress' inaction upon being notified of the supposed problem indicates that Congress is satisfied with the currently-understood scope of the exemption. See *Blau v. Lehman*, 368 U.S. 403, 412-13 (1962).

**D. Whichever Competing Limiting Interpretation Is Used the Result Is the Same—the Farmer's Exemption Is Eviscerated.**

Under any of the "ensuing crop limitation" interpretations put forth by Asgrow and its supporters during the litigation of this case, one result is clear—the farmer's exemption would be eviscerated. The ensuing crop limitation would relegate the Winterboers to sell to other farmers no more than 1/45th of their soybean crop. Thereby, the right of farmers to sell seed to other farmers, enjoyed from the beginning of agriculture, would be effectively eliminated. More importantly, the balancing of political, economic and social considerations adopted by Congress and expressed in the PVPA would be recast.

Asgrow's contention that the farmer's exemption functions in a manner partly contrary to the primary purposes of the Act—the granting of protection to developers of new varieties—is not a startling observation, nor a particularly significant one. It is obvious that any exception or exemption in a statutory scheme may work at cross purposes to other, more general statutory purposes. This does not mean that the exemption must be stricken from the statute. Rather, the exemption is entitled to the same respect as the rest of the statute. *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2071 (1993) ("vague notions of a statute's 'basic purpose' are



... inadequate to overcome the words of its text regarding the *specific* issue under consideration").

Exemptions in intellectual property statutes are not to be automatically rejected merely because they impinge on the property-owner's prerogatives. For example, the Copyright Act limits the copyright owner's exclusive control over copyrighted work by allowing fair use of the material. The courts may not ignore this exemption in pursuit of absolute protection for the copyright owner. 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994). Likewise, the farmer's exemption should not be read out of the PVPA merely because of an alleged conflict between the exemption and the general purpose of the statute.

**E. Brown-Baggers Compete With Breeders on the Fringe of the Market and Pose No Serious Threat to Their Activities.**

One of Asgrow's central tenets of Asgrow's is the contention that "brown-baggers" pose a serious competitive threat to seed breeders. Thus, according to Asgrow, unless the Court interprets Section 2543 of the PVPA contrary to its plain meaning to eliminate this activity, breeder's rights under the Act will become meaningless, an "absurd consequence." Pet. Br. at 17. This contention is demonstrably wrong.<sup>15</sup>

If at all, brown-baggers compete with breeders of certified seed at the fringes of the market. The general perception in the industry is that brown-bagged seed is an inferior and lesser quality seed. Asgrow and other breeders raise seed under very carefully controlled conditions. Contract agents must enter into contracts affirming they

<sup>15</sup> Unfortunately, there is no "record" of developed facts on this and other Asgrow contentions. Asgrow's "General Factual Background" is blatantly partisan and insupportable. Indeed, most of the "facts" are little more than the excited hyperbole of lawyers. Of course, Congress, not this Court, is the proper forum for entertaining and sorting out these viewpoints.

will adhere to rigorous growing conditions. These requirements are designed to ensure that quality, such as plant purity and growing characteristics, including germination rates, are protected. Indeed, Tanimura & Antle, Inc., a California grower and shipper of vegetable produce, in an amicus curiae brief filed before the Federal Circuit, stated that they generally buy seed from commercial growers because the quality of the seed supplied "is often much better than the quality of the seed T&A could produce itself." Brief for Amicus Curiae Tanimura & Antle, Inc. at 2 (March 6, 1992).

In addition, farmers are extremely dependent upon the quality of the seed for their livelihood. A seed which fails to germinate properly or to produce plants of the type expected could destroy a year's work and undermine the farmer's finances. The typical farmer, faced with substantial debt, is unlikely to risk significant crop loss by buying seed from his or her neighbor. The same farmer can always look to an Asgrow for the lost profits from crops that fail to germinate, and expect to be compensated. The same farmer cannot expect the Winterboers to guarantee their crops.

Further evidencing this "discount" market in which brown-baggers operate is the disparity between the prices they command and those commanded by the commercial breeders. The record discloses that the Winterboers sold their 1990 crop for approximately \$8.70 per bushel; Agrow's agents sell soybean for approximately \$16 per bushel. Agrow, mistakenly, decries this difference with the statement that the Winterboers can charge less because they are not required to amortize the costs of plant research and development. Pet. Br. at 7 & n.5. But farmers are *price-takers*, not price setters.<sup>16</sup> Thus, the

<sup>16</sup> That is, the quantity of a crop they put on the market has no effect on the crop's market price and the farmer must sell at the going market price. See, C.S. Barnard & J.S. Nix, *FARM PLANNING AND CONTROL* 21 (1973) ("If the level of output has no effect on the price per unit received, as is usually the case in farming . . . .")

market, not the brown-bagger, determines the price of its crop sold for seed. The price differential is an irrebuttable statement that brown-bag seed serves a different, or discount, market.

Finally, because of the development of this case below, discovery has not been pursued on a fact fundamental to Asgrow's position. According to the testimony of Denny Winterboer, the only reason his sales were so robust is the fact that there existed a shortage of Asgrow varieties A1937 and A2234 in the Clay County, Iowa area. Although Asgrow later disputed this point, the Winterboers are prepared to establish this fact at trial.

**F. Asgrow's "One Ensuing Crop" Limitation of the Farmer's Exemption Would Severely Penalize Vegetable Seed Growers, Who Commonly Save Five Years of Seed, and Otherwise Is Unenforceable.**

Asgrow maintains that the opening sentence of Section 2543, because of its reference to Section 2541(3), prevents a farmer from selling to farmers more seed than that required to plant one crop. It takes this position despite the explicit clause, "notwithstanding the provisions of section 2541(3) . . ." in the second part of Section 2543. This interpretation may be consistent with its experience as a soybean and wheat developer. Unfortunately, Asgrow's interpretation, if adopted, would pose grave difficulties for vegetable seed growers.

In an amicus brief filed with the Federal Circuit, Tanimura & Antle, Inc., explained that the farmer's exemption "is of unique importance and usefulness to western vegetable growers." Brief for Amicus Curiae Tanimura & Antle, Inc. at 5 (March 6, 1992). The company explained that the limitation on the farmer's exemption to one crop would have a severe impact on its operation because vegetable growers commonly *save seed for four or five future crops*:

The need to grow seed plants separately, rather than gathering seed as part of ordinary harvest operations,

and the relative difficulty of growing good quality seed of vegetable crops means that the seed can only be produced efficiently and effectively in large quantities, since much of what is produced is likely to be discarded as of low quality. For this reason, seed of vegetable crops is ordinarily grown on a large-scale basis, with as much as a four or five year supply grown and collected at once.

Brief for Amicus Curiae Tanimura & Antle, Inc. at 5 (March 6, 1992). Tanimura & Antle thus urged the Federal Circuit to at least correct the implication in the District Court's decision that the right to save seed was limited to the amount of one ensuing crop. Asgrow's proffered limitation on the right to sell seed rests on a limitation on the right to save seed, because if a farmer saved more than the amount needed to plant one ensuing crop "he must be presumed to have done so in order to sell it as seed [and] such seed will necessarily have been sexually multiplied as a step in marketing the novel variety for growing purposes." Pet. Br. at 22. By limiting the ability of farmers to save seed, Asgrow's proffered interpretation would harm those farmers that at times need to save more than the amount necessary to plant a single ensuing crop, such as vegetable growers.

Apart from markedly increasing the costs of western vegetables and decreasing such farmers' efficiency, the Asgrow interpretation is virtually unenforceable. Judge O'Brien noted that his interpretation raised significant enforcement problems:

This Court realizes that allowing a farmer to save an amount of seed reasonably necessary to plant the next year's crop may lead to a situation where courts will be required to determine what amount of seed is reasonably necessary to plant the next year's crop.

Pet. App. at 22a n.3.

Indeed, the problems with such an imputed limitation are myriad. At what moment in time must the determi-



nation be measured? What if a farmer later decides to lease additional acreage? What if the farmer later loses a lease with a neighboring farmer to plant crops? What if growing conditions change, thus increasing the number of bushels required to grow one crop? These and many other real world factors would make the enforcement of the Act a nightmare, and would needlessly clog the courts with PVPA cases.

In fact, one of the purposes of the farmer's exemption is to reduce paperwork and enforcement duties for farmers. When the House of Representatives placed a farmer's exemption in the Transgenic Animal Patent Reform Act, H.R. 4970, 100th Cong., 2d Sess. (1988), it noted this as one of the salutary features of such an exemption. Modelled after the farmer's exemption in the PVPA, "the only other American intellectual property law that regulates rights in self-reproducing subject matter," the Report of the House Committee on the Judiciary stated:

The existence of a farmers exemption has a number of beneficial results: (1) it reduces burdensome recordkeeping; (2) it avoids placing farmers in the role of patent enforcers; (3) it reduces uncertainty about the law; and (4) it will not destroy the market

.....

H.R. Rep. No. 888, 100th Cong., 2d Sess. 73 (1988), reprinted in *ANIMAL PATENTS: THE LEGAL, ECONOMIC AND SOCIAL ISSUES* 257 (William H. Lesser ed. 1989).

The fact that Asgrow's proffered limitation on the right to save seed would be extremely harmful to farmers such as vegetable growers, and would create enforcement and paperwork headaches for farmers, are just two other factors indicating the problematic nature of the imputed limitation.

### G. Important Public Policy Issues Support the Carefully Crafted Limitations by Congress in Enacting the PVPA.

Asgrow's real contention is that this Court should ignore the plain meaning of the farmer's exemption and embrace its restrictive interpretation because in its view, what is good for plant breeders is good for America. Asgrow insists that the protections under the PVPA must be made as strong as possible to maximize breeders' incentives to research. However, with the PVPA, as with all intellectual property protection, the socially optimum property rights regime is one which provides incentive for the appropriate amount of research in exchange for a reasonable distribution of the net gains from the new technology between the private investor and the public.<sup>17</sup> The fact is, there are several valid policy reasons justifying the limitation, in the form of the farmer's exemption, placed by Congress on seed companies' monopolization of plant genetic resources.

First, it must be appreciated that the showing that a breeder must make to obtain a certificate is meager. Unlike a utility patent, the applicant for a PVPA certificate need *not* now show "non-obviousness," or any utilitarian improvement over existing varieties. The standard used is "distinctiveness," "uniformity," and "stability." None of these measures is necessarily directly related to a cultivar's agronomic value.

The weak showing needed to qualify for PVPA certification is highly significant from a policy perspective. First, it allows private sector borrowing from public sector breeding research. "Varieties released by public

<sup>17</sup> See Richard K. Perrin, *Intellectual Property Rights in the Public Interest*, in *U.S. AGRICULTURAL RESEARCH: STRATEGIC CHALLENGES AND OPTIONS* 181, 182-85 (Robert D. Weaver ed., 1993); A. Allen Schmid, *Biotechnology, Plant Variety Protection, and Changing Property Institutions in Agriculture*, 7 *NORTH CENTRAL JOURNAL OF AGRICULTURAL ECONOMICS* 129, 137 (July 1985).

experiment stations are backcrossed by private breeders to change some one or more of their descriptors such as chaff color in wheat and then patented and promoted as a new variety." Schmid, *supra* n.17, at 132. In this way, certificate holders appropriate for themselves the efforts of state research centers. The state research centers, in turn, relied upon plant cultivars that were developed by farmers over decades or even centuries. See David Wood, *Crop Germplasm: Common Heritage or Farmers' Heritage?*, in SEEDS AND SOVEREIGNTY: THE USE AND CONTROL OF PLANT GENETIC RESOURCES 274 (Jack R. Kloppenburg, Jr. ed. 1988). Given the derivation of such cultivars, it is not unreasonable to permit farmers, in the carefully defined situations identified by the Federal Circuit's decision, to sell PVPA-protected seeds for reproductive purposes to other farmers.

Second, the ease with which PVPA certificates can be obtained by private seed companies encourages economically wasteful "cosmetic breeding." The emergence of breeders' rights statutes has shifted breeding research resources from the public to the private sector, which has led to a shift in "the objective of the breeders . . . from that of increasing farm productivity to that of giving sales arguments to the marketing departments of the seed companies." Jean-Pierre Berland and Richard Lewontin, *Breeders' Rights and Patenting Life Forms*, 322 NATURE 785, 787 (August 1986).

The fact that eligibility for protection under the PVPA requires no demonstration of economic utility over existing varieties means that this fine-tuning can be used to create "pseudo-varieties." . . . [P]rivate breeding work may involve a substantial amount of unproductive effort to achieve uniqueness, and thus protectability, through transfer of non-economic traits such as flower color.

Jack R. Kloppenburg, Jr., *FIRST THE SEED: THE POLITICAL ECONOMY OF PLANT BIOTECHNOLOGY, 1492-2000* 144 (1988). Not only can economically insignificant

traits like flower color serve as the basis for novelty, but even unique *disutility* can form the basis of PVPA certification—one PVPA certificate was awarded to a company for developing a new variety of soybean whose "novel and distinguishing feature" was that it was *susceptible* to a certain plant disease! Jack Doyle, *ALTERED HARVEST: AGRICULTURE, GENETICS, AND THE FATE OF THE WORLD'S FOOD SUPPLY* 320 (1985).<sup>18</sup>

With respect to "uniformity" and "stability," the PVPA Office must rely upon the representations of the applicant. In practice, however, the phenomenon of "genetic drift"—the loss of genetic characteristics in each successive generation—causes substantial variations in sexually produced plants within a few generations. The USDA originally opposed granting patent protection to sexually reproducing plants in part because of such concerns. Cary Fowler, *UNNATURAL SELECTION: TECHNOLOGY, POLITICS AND PLANT EVOLUTION* 112 (forthcoming 1994). Indeed, the Winterboers are confident that, if necessary, at trial they could establish that the seeds for which Asgrow claims protection, A1937 and A2234, are significantly different from the seeds for which certifications were granted.

Because of genetic drift, farmers typically have to buy new seeds from the certificate holder after two or three years in order for the quality to correspond with that of the parents. Genetic drift has largely prevented the farmer's exemption from undermining the economic incentives underlying the PVPA's promotion of research. Robert P. Merges, *Intellectual Property in Higher Life Forms: The*

<sup>18</sup> Given the PVPA's encouragement of product differentiation through the creation and sale of proprietary varieties, the suggestion that the increase in the number of varieties after passage of the PVPA measures agronomic progress, see, e.g., *ASTA Amicus Br.* at 10, "is tantamount to measuring a temperature first with a Celsius thermometer, then with a Fahrenheit thermometer, and concluding that the temperature has approximately doubled." Berland and Lewontin, *supra* p. 38.



*Patent System and Controversial Technologies*, 47 MD. L. REV. 1051, 1071 (1988); W. Lesser, *Modifications in Intellectual Property Rights Law and Effects on Agricultural Research*, in U.S. AGRICULTURAL RESEARCH: STRATEGIC CHALLENGES AND OPTIONS (Robert D. Weaver ed. 1993).

As the only statute in American Law that provides intellectual property rights to self-reproducing subject matter, the PVPA "was drafted with a sensitivity to the practical problems of farmers who have to cope with intellectual property rights over their primary source of livelihood." Merges, *supra*, 47 MD. L. REV. at 1070. As pointed out above, the House of Representatives, in considering the Transgenic Animal Patent Reform Act, noted some of the benefits of a farmer's exemption, including that it reduces burdensome recordkeeping for farmers, avoids difficult enforcement requirements, reduces uncertainty, and has little detrimental impact on incentives to research because of genetic drift. H.R. Rep. No. 888 at 73, *supra* p. 36.

The limited showing and practical problems of reproducing stable and uniform sexually reproduced plants support a limitation on the breeders rights afforded by Congress. The introduction of a new variety does not entail the complex efforts associated with biotechnology or the development of hybrids and mutants. Breeders of new life forms developed through biotechnology may receive utility patents under this Court's decision in *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), and developers of new and distinct asexual plants may receive protection under the Plant Patent Act, 35 U.S.C. § 161, *et seq.* In contrast, the process of introducing new varieties under the PVPA is one of selection and cross breeding—activities that have been carried out by farmers since the beginning of agriculture.

In sum, even if this Court's role was to rewrite legislation to conform to the public interest, the farmer's exemp-

tion as currently generally understood represents a socially, economically and politically appropriate limitation on the seed industry's monopoly control over plant genetic resources, and should not be disturbed.

### III. THE NOTICE REQUIREMENT OF SECTION 2541(6) DOES NOT APPLY TO SAVED SEED.

The Federal Circuit correctly held that the notice requirement of 7 U.S.C. § 2541(6) did not apply to saved seed. Pet. App. 13a. The Solicitor General concurs with this view as well. Sol. Gen. Br. at 22-27.

The language of the statute is clear. Section 2541(6) provides, in relevant part, that—

*Except as otherwise provided in this subchapter, it shall be an infringement of the rights of the owner of a novel variety to perform without authority any of the following acts . . . :*

(6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received[.]

7 U.S.C. § 2541(6) (emphasis added).

The operative element of this language is the introductory phrase, "[e]xcept as otherwise provided in this subchapter . . . ." Section 2543 is the provision within the subchapter that clearly provides otherwise. It provides, in relevant part, that—

without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

7 U.S.C. § 2543.

Section 2543 thus unambiguously provides that it is not an infringement for a farmer to sell saved seed for reproductive purposes to another farmer in accordance with applicable state law. Putting aside for the moment the dispute as to how much saved seed can be sold, and who may be considered a farmer, it is beyond argument that Section 2543 allows *some* saved seed to be sold in *some* circumstances. Thus, it is equally beyond argument that, when such saved seed is sold—or, in the words of Section 2541(6), “dispensed . . . to another, in a form which can be propagated”—it need not contain the notice otherwise required by Section 2541(6). Otherwise, the introductory phrase, “except as otherwise provided in this subchapter,” would have no meaning.

Asgrow’s argument that the first sentence of Section 2543 authorizes only the sale of saved seed, and that Section 2541(6) does not relate to sales, but only to giving of notice, rests on either a fundamentally misguided attempt to distinguish between the act of sale and the giving of notice, or a similarly weak attempt to distinguish between “selling” saved seed and “dispensing” it. But Subsection (6) of Section 2541 makes the notice requirement entirely dependent on “dispens[ing]” the seed. And, clearly, selling seed is one way of dispensing it. Thus, Asgrow’s argument finds no support in the language or structure of the statute.

Nor do Asgrow’s policy arguments fare any better. Its argument that requiring notice even on such “brown bag” sales is consistent with the statute’s purpose that a purchaser have actual notice before being subject to an infringement suit, Pet. Br. at 39, is undercut by the fact that the statute does not in fact require actual notice as a prerequisite for liability for infringement, except in the narrow circumstance where the distribution is authorized by the owner of the novel variety. Section 2567 requires proof of actual notice only where seed is distributed “by authorization of the owner and is received by the in-

fringer without” labeling or marking. But Section 2567 says nothing about any such requirement where distribution is made *without* the authorization of the owner, indicating that Congress did not intend actual notice to be a prerequisite to liability in that circumstance.

For these reasons, the Court should hold, in accordance with the court of appeals below and with the argument of amicus curiae the Solicitor General here, that any sale of saved seed allowed by the statute is exempt from the notice requirement of Section 2541(6).

### CONCLUSION

The Court should affirm the decision of the Federal Circuit preserving the farmer’s exemption to the Plant Variety Protection Act. Asgrow’s invitation to rewrite the farmer’s exemption and to limit sales in the case of soybeans to 1/45th of a farmer’s crop in order to further Asgrow’s ideas of the purposes of the PVPA should be expressly rejected. The compromise Congress struck in the PVPA carefully balances breeders’ rights against the centuries-old right of farmers to save and sell seed grown on their farms to other farmers. The Court’s restraint against rewriting legislation is particularly appropriate considering that Congress, in reaction to lobbying by various pharmaceutical and chemical companies dissatisfied with this compromise, is now considering amendments to the farmer’s exemption.

Respectfully submitted,

WILLIAM H. BODE

Counsel of Record

LUIS M. ACOSTA

WILLIAM H. BODE & ASSOCIATES

1150 Connecticut Avenue, N.W.

Ninth Floor

Washington, D.C. 20036

(202) 828-4100

Counsel for Respondents

Denny Winterboer and

Becky Winterboer

August 1, 1994



SEP 2 1994

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1994

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

**REPLY BRIEF FOR THE PETITIONER**

*Of Counsel:*

BRUCE STEIN  
SIDNEY B. WILLIAMS, JR.  
THE UPJOHN COMPANY  
7000 Portage Road  
Kalamazoo, Michigan 49001  
(616) 323-4000  
LAWRENCE C. MAXWELL  
MARY ELLEN MORRIS  
TRABUE, STURDIVANT & DEWITT  
511 Union Street  
Nashville, Tennessee 37219  
(615) 211-9270

RICHARD L. STANLEY  
*Counsel of Record*  
JOHN F. LYNCH  
ARNOLD, WHITE & DURKEE  
750 Bering Drive  
Suite 400  
Houston, Texas 77057  
(713) 787-1400  
*Counsel for Petitioner*  
*Asgrow Seed Company*

## TABLE OF CONTENTS

	Page
I. THE ONLY SEED THAT CAN BE SOLD UNDER SECTION 2543 IS THE LIMITED QUANTITY THAT WOULD BE NEEDED TO PRODUCE ANOTHER CROP ON THE SELLER'S FARM .....	1
A. The Limit On The Amount Of Seed That Can Be Sold Under Section 2543 Is Set By The First Half Of The First Sentence Of The Section .....	3
B. The Conditions Under Which "Such Saved Seed" Can Be Sold Under Section 2543 Are Set By The Proviso In The First Sentence....	5
C. The Term "Marketing" In Section 2541(3) Must Be Given Its Ordinary Meaning Which Includes All Acts Of Selling .....	6
D. Section 2543 Only Limits The Amount Of Protected Seed That Can Be Sold For Reproductive Purposes .....	7
E. There Are No Prior Interpretations Of Section 2543 To Which This Court Owes Deference .....	9
F. The Respondents' Other Attempts To Avoid Liability Are Irrelevant .....	11
G. The Policy And Constitutional Challenges To The PVPA Are Misplaced And Meritless..	13
II. THE NOTICE PROVISION IN SECTION 2541(6) IS APPLICABLE TO ALL SALES OF PVPA SEED PERMITTED UNDER SECTION 2543 .....	14
A. Congress Only Exempted Sales When It Provided That It Shall Not Infringe Any Right To Sell Such Saved Seed .....	15



## TABLE OF CONTENTS—Continued

	Page
B. Congress Did Not Allow Or Intend For Any Protected Seed To Be Used To Produce A Hybrid Or Different Variety .....	17
C. Section 2543 Should Be Narrowly Construed To Further Congress' Purpose Of Requiring Notice In All PVPA Seed Transactions.....	18
CONCLUSION .....	20

## TABLE OF AUTHORITIES

Cases	Page
<i>A.H. Phillips, Inc. v. Walling</i> , 324 U.S. 490 (1945) .....	18
<i>Asgrow Seed Co. v. Kunkle Seed Co.</i> , No. 86-3138-A (W.D. La. 1987), <i>aff'd</i> , 845 F.2d 1034 (Fed. Cir. 1988) .....	9
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 114 S. Ct. 1164 (1994) .....	1
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281 (1979) .....	10
<i>Commissioner v. Clark</i> , 489 U.S. 726 (1989) .....	18
<i>Demarest v. Manspeaker</i> , 498 U.S. 184 (1991) .....	10
<i>Eli Lilly &amp; Co. v. Medtronic, Inc.</i> , 496 U.S. 661 (1990) .....	1
<i>Federal Election Comm'n v. Democratic Senatorial Campaign Comm.</i> , 454 U.S. 27 (1981) .....	11
<i>Freytag v. Commissioner</i> , 111 S. Ct. 2631 (1991) ..	16
<i>Hallstrom v. Tillamook County</i> , 493 U.S. 20 (1989) .....	18
<i>In re Snyder</i> , 472 U.S. 634 (1985) .....	14
<i>Keene Corp. v. United States</i> , 113 S. Ct. 2035 (1993) .....	17
<i>Laitram Corp. v. Cambridge Wire Cloth Co.</i> , 863 F.2d 855 (Fed. Cir. 1988), <i>cert. denied</i> , 490 U.S. 1068 (1989) .....	12
<i>Perrin v. United States</i> , 444 U.S. 37 (1979) .....	7
<i>Robertson v. Seattle Audubon Society</i> , 112 S. Ct. 1407 (1992) .....	13
<i>Schneidewind v. ANR Pipeline Co.</i> , 485 U.S. 293 (1988) .....	10
<i>Shamrock Technologies, Inc. v. Medical Sterilization, Inc.</i> , 903 F.2d 789 (Fed. Cir. 1990) .....	12
<i>United Parcel Service, Inc. v. Mitchell</i> , 451 U.S. 56 (1981) .....	14
<i>United States Nat'l Bank v. Independent Ins. Agents of America, Inc.</i> , 113 S. Ct. 2173 (1993) ..	4
<i>United States v. Frame</i> , 885 F.2d 1119 (3d Cir. 1989), <i>cert. denied</i> , 493 U.S. 1094 (1990) .....	14
<i>United States v. Morton</i> , 467 U.S. 822 (1984) .....	2
<i>United States v. Nordic Village, Inc.</i> , 112 S. Ct. 1011 (1992) .....	16
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942) .....	14

## TABLE OF AUTHORITIES—Continued

Statutes	Page
7 U.S.C. § 2326 .....	9
7 U.S.C. § 2404 .....	12
7 U.S.C. § 2483 .....	12
7 U.S.C. § 2541 .....	2, 4, 15-19
7 U.S.C. § 2541 (1) .....	4, 15-16, 18
7 U.S.C. § 2541 (2) .....	14, 18
7 U.S.C. § 2541 (3) .....	3, 4, 6, 7, 15-17
7 U.S.C. § 2541 (4) .....	3, 4, 17, 18
7 U.S.C. § 2541 (5) .....	14, 18
7 U.S.C. § 2541 (6) .....	14, 16-19
7 U.S.C. § 2541 (7) .....	14, 18
7 U.S.C. § 2541 (8) .....	14, 18
7 U.S.C. § 2543 .....	<i>passim</i>
7 U.S.C. § 2561 .....	10
7 U.S.C. § 2567 .....	19
7 U.S.C. §§ 2901-11 .....	14
17 U.S.C. § 107 .....	1
28 U.S.C. § 1338 (a) .....	10
35 U.S.C. § 6 .....	9
35 U.S.C. § 271 (e) (1) .....	1

## REPLY BRIEF FOR THE PETITIONER \*

Both Asgrow and the Winterboers assert that the plain language of the first sentence of 7 U.S.C. § 2543 compels their interpretation and that the policy arguments offered by the other party cannot be used to rewrite the statute under the guise of statutory interpretation. Only Asgrow is correct. When all of the words in that sentence are given meaning, they compel Asgrow's statutory interpretation as a matter of law.

**I. THE ONLY SEED THAT CAN BE SOLD UNDER SECTION 2543 IS THE LIMITED QUANTITY THAT WOULD BE NEEDED TO PRODUCE ANOTHER CROP ON THE SELLER'S FARM**

The legal issue presented by the facts of this case is whether Congress intended that a soybean farmer be able to produce forty-five times the amount of PVPA-protected soybean seed that was obtained from the PVPA-certificate owner, and then sell *over twenty-two times* what he purchased in competition with the owner of the variety. See Pet. App. 32a n.2; ASTA Brief 10-15. No statutory scheme of intellectual property protection, particularly one covering a commodity that reproduces itself many times over, would have been designed by Congress with such an immense loophole from infringement.<sup>1</sup>

The Winterboers' attempt to cloak themselves in a "centuries-old right of farmers to sell seed to other farmers for seeding purposes" (Resp. Br. 10) ignores that Congress clearly restricted the right to sell PVPA-

\* The Petitioner's statement for purposes of Sup. Ct. R. 29.1 appears at Pet. Br. ii.

<sup>1</sup> The other federal intellectual property laws—patent, copyright, and trademark—contain no or only narrow exemptions to an owner's commercial enjoyment of the protected creation. Cf. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994) ("fair use" limitations on copyrights in 17 U.S.C. § 107); *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990) (construing limited exemption from patent infringement in 35 U.S.C. § 271(e)(1)).



protected seed for reproductive purposes. Section 2541 lists the infringing acts, which include selling the novel variety and sexually multiplying the variety as a step in marketing it for growing purposes. Pet. App. 40a. Section 2543 provides certain exceptions from infringement for certain sales of seed produced “from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes” (hereinafter “authorized seed”). *Id.* at 41a; *see also* Pet. Br. 18 n.10.

The first sentence in section 2543 sets forth the only permissible uses for *reproductive* purposes of protected seed produced from “authorized seed” by one acting without the owner’s authorization. In contrast, the second sentence allows protected seed to be sold for *nonreproductive* uses without any quantitative limitation. Finally, the third sentence imputes notice of infringement to anyone who diverts protected seed to reproductive purposes after purchasing the protected seed in channels usual for non-reproductive uses. In that manner, each sentence in the statute serves a distinct purpose. *See* Pet. Br. 4 & n.4; 27-28.

Only the first sentence of section 2543 is at issue before this Court. Contrary to the Winterboers’ accusations, Asgrow does not rely on a vague policy rationale as a substitute for the clear language of the statute. When this Court construes the language of section 2543 as a whole, *United States v. Morton*, 467 U.S. 822, 828 & n.8 (1984), it can only reach the same conclusion reached by Asgrow and by the Solicitor General—that the quantity of protected seed produced by a farmer that can be sold to others for reproductive purposes is limited to the amount needed by the seller/grower for use “in the production of a crop” on his farm. Pet. App. 41a.

**A. The Limit On The Amount Of Seed That Can Be Sold Under Section 2543 Is Set By The First Half Of The First Sentence Of The Section**

The Winterboers and the Brief Amici Curiae for Rural Advancement Foundation International, *et al.* (“the RAFI Brief”) incorrectly conclude that there is no quantitative limit on the amount of protected seed that can be saved and sold under section 2543. *E.g.*, Resp. Br. 8, 14-17; RAFI Brief 4, 14. In the initial clause of the first sentence, Congress excepted from the exemption seed production that would constitute sexually multiplying the novel variety as a step in marketing it for growing purposes (section 2541(3)) or using the novel variety to produce a hybrid or a different variety (section 2541(4)). That clause has the effect of limiting the amount of “such saved seed” that can be sold for reproductive purposes under the terms of the proviso in that same sentence. Because section 2541(4) is not implicated here (Pet. Br. 20 n.13), the “such saved seed” in this case is that seed which was produced without infringing section 2541(3), *i.e.*, that quantity of seed that has *not* been sexually multiplied by the Winterboers as a step in marketing Asgrow’s novel varieties for growing purposes.

The Winterboers state that “[t]he reference in the introductory ‘except’ clause to Section 2541(3) does restrict the *purpose* for which a person can save the seed—a farmer cannot save it for the purpose of ‘sexually multiply[ing] the seed as a step in marketing (for growing purposes).’” Resp. Br. 11. The Winterboers err in focusing on the seed produced rather than on the action that produces the seed. In actuality, the first reference to section 2541(3) restricts the purpose for which a person can *produce* seed of a protected variety that is to be saved and later used or sold as seed. *See* Brief for the United States As Amicus Curiae Supporting Petitioner (“U.S. Brief”) 11-14. Thus, if the sexual multiplication that produces the protected seed in question is or becomes a step in marketing the variety for growing purposes, the resulting

seed is excluded by the first reference to section 2541(3) in section 2543 from being within the scope of what can be considered "such saved seed."

When the same word or phrase appears more than once in the same statute, it should be given the same meaning in both places. *E.g.*, *United States Nat'l Bank v. Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2185 (1993). Because the phrase "such saved seed" appears both in the opening clause and in the proviso of the first sentence of section 2543, it must refer to the same quantity of seed.

By operation of the first clause, protected seed cannot be saved if the sexual multiplication that produced that seed was a step in marketing the variety for growing purposes. Thus, the first portion of the first sentence in section 2543 limits the quantity of protected seed that can be within the scope of "such saved seed" to which the remainder of the sentence applies. The proviso in the remainder of the first sentence then specifies the conditions of who can sell and how that limited quantity of "such saved seed" can be sold for use as seed.<sup>2</sup>

The Federal Circuit erroneously concluded that the initial clause of section 2543 gives a person who has produced seed from "authorized seed" an exemption from all subsections of section 2541 except subsections (3) and (4). *See* Pet. App. 6a, 13a. Instead, that initial clause only limits the quantity of seed that can be saved as "such saved seed," not the conditions under which "such saved seed" can be sold without liability.

<sup>2</sup> In contrast, the phrase "such saved seed" is not in the second sentence of section 2543 so that sentence authorizes any amount of seed of a protected variety (not just "such saved seed") to be sold for *nonreproductive* purposes, notwithstanding the prohibition against sales in section 2541(1).

#### B. The Conditions Under Which "Such Saved Seed" Can Be Sold Under Section 2543 Are Set By The Proviso In The First Sentence

The Winterboers assert that the proviso allows any person whose primary farming occupation is the growing of crops for sale for other than reproductive purposes to sell "*any* seed he or she has saved to other farmers similarly situated." Resp. Br. 11-12 (emphasis added). Attempting to support that flawed view, the Winterboers and the RAFI amici devote much effort to showing that there is no quantitative limit in section 2543 as to how much seed can be *saved*. However, their focus on the act of "saving" seed and on whether "saving" equals "marketing" (RAFI Brief 16) is misplaced.

By its express terms, the proviso does not authorize the sale of "*any* seed saved" but only provides the conditions under which "such saved seed" may be sold. That proviso allows only those persons whose "primary farming occupation" is the growing of crops for nonreproductive purposes to sell "such saved seed" to other persons so engaged, provided such sales comply with all applicable state seed laws. Pet. App. 41a. As Judge Newman correctly noted, the "primary farming occupation" phrase only determines which farmers qualify to sell any saved seed at all, not how much seed a farmer may sell. Pet. App. 36a. Moreover, the "such saved seed" referenced in the proviso corresponds to the same limited quantity of seed defined by the first half of the sentence which allows only "such saved seed" to be sold as provided in this section.

The quantitative limitation that Congress provided in section 2543 arises when the producer plans or decides to sell or otherwise market protected seed to others for growing purposes. To the extent that the protected variety has been sexually multiplied as a step in marketing the variety for growing purposes, the first clause of section 2543 excepts that portion of the resulting crop from what



can be saved as the "such saved seed" to which the rest of the first sentence of section 2543 applies. Thus, in practical effect, the statute should cause a rational farmer to limit the amount of his crop that he saves for seed because he will not be able to sell any more for reproductive purposes than the amount he would have needed to produce a crop on his own farm.

The Winterboers argue that the second reference to section 2541(3) in the proviso of section 2543 "contemplates sales by qualified farmers in excess of that necessary to replant the crop in the next season." Resp. Br. 8. However, that latter reference in the proviso only creates an exemption from the provisions of section 2541(3) for sales of the "such saved seed" delimited by the initial portion of the sentence, not for "all saved seed." Thus, the proviso allows "such saved seed" to be sold even though it had been sexually multiplied as a step in having that seed available to sell or market for growing purposes; however, the proviso does not allow *any* seed that is "saved" by a farmer to be sold without regard to the provisions of section 2541(3).

**C. The Term "Marketing" In Section 2541(3) Must Be Given Its Ordinary Meaning Which Includes All Acts Of Selling**

The Winterboers attack Asgrow's statutory interpretation on the ground that it requires that the meaning of "marketing" for purposes of section 2541(3) be synonymous with the meaning of "selling."<sup>3</sup> Resp. Br. 8. However, Asgrow did not equate the two terms nor does Asgrow's interpretation require or depend upon the two terms being given the same meaning. Indeed, Asgrow

<sup>3</sup> Both the Winterboers and the RAFI amici also suggest that it does not matter how "marketing" is interpreted because farmer-to-farmer sales are exempted under section 2543. Resp. Br. 24-25; RAFI Brief 15 n.5 & 16-17 n.8. However, such arguments are based on their failure to discern that the proviso only permits sales of "such saved seed," not any seed that is saved.

agrees with the Winterboers that the two terms "have independent meanings" (Resp. Br. 10) and with Judge Rader's personal view that "[s]elling is different from marketing." Pet. App. 29a n.\*. However, the terms also are not mutually exclusive.

Rather than construing "marketing" as being restricted only to a specialized subset of selling as did the Federal Circuit, Pet. App. 12a-13a, Asgrow and the Solicitor General properly turned to the common meanings of both terms because no unique definitions were provided in the Act. *Perrin v. United States*, 444 U.S. 37, 42 (1979). In accordance with their ordinary definitions, "marketing" is clearly broader than "selling" and includes all acts and forms of "selling." See Pet. Br. 20-21; U.S. Brief 12-13 & nn.9-10.

When "marketing" is given its ordinary meaning, section 2541(3) thus prohibits any sexual multiplication of a novel variety as a step in marketing the variety for growing purposes, regardless of whether the "marketing" at issue results in a direct sale, an exchange, or a promotion involving the protected seed. For example, sexually multiplying the protected variety in order to distribute samples of it or to trade protected seed for goods or services is prohibited by section 2541(3), even if no direct sale or money transaction is involved. Similarly, all selling falls within the scope of "marketing" for purposes of section 2541(3), regardless of whether the sale or offer for sale is accompanied or facilitated by advertising, sales agents, or extended merchandising or retail activities.

**D. Section 2543 Only Limits The Amount Of Protected Seed That Can Be Sold For Reproductive Purposes**

The amicus curiae brief of Tanimura & Antle before the Federal Circuit was concerned with avoiding an interpretation of section 2543 that would restrict the amount of protected seed that could be saved in contrast to limit-

ing the amount of saved seed that could be sold. See Tanimura Brief 1-2. According to Tanimura, vegetable farmers may save seed from a single crop in sufficient quantity to meet their planting needs for multiple future years, not just the next one. *Id.* at 5. While Tanimura represented that it had never sold any saved seed to others and had no plans to do so in the future, *id.*, the Winterboers now argue that Asgrow's interpretation of section 2543 would pose grave difficulties for vegetable farmers.

The Winterboers' "crocodile tears" on behalf of vegetable growers are unpersuasive because no such difficulties exist. The first clause of 7 U.S.C. § 2543 does not impose a quantitative restriction on the amount of protected seed that can be saved. Instead, it only imposes a quantitative restriction on the amount of protected seed that can be sold for reproductive purposes. In the absence of any selling (or other marketing) of PVPA-protected seed produced from "authorized seed," section 2543 imposes no direct quantitative limit on the act of saving seed produced by the grower because no protected seed will have been sexually multiplied as a step in marketing the novel variety for growing purposes.

If a vegetable farmer produces a crop from authorized seed and saves enough seed to plant his farm for the next five years, and then actually uses that seed on his farm and/or never sells or dispenses any of the saved seed to others, no liability will result.<sup>4</sup> On the other hand, a vegetable farmer that habitually saves excess seed for alleged expansion that never happens should be unable to

<sup>4</sup> While a vegetable farmer may save enough seed for multiple future crops, if that farmer later decides to sell seed to others, section 2543 would restrict the amount that could be sold to the "such saved seed" needed "in the production of a crop" on his farm, *i.e.*, one crop. Resolution of that particular issue is not necessary here because all of the Winterboers' Asgrow seed was sold and because it is not practical to save soybean seed for more than one year.

prove that he has not been sexually multiplying the novel variety as a step in having seed to sell to others. In the latter situation, there will be little doubt that the protected variety had been sexually multiplied as a step in marketing the variety for growing purposes because the farmer was saving more seed than he reasonably needed in order to produce another crop on his own farm. Moreover, the professed concerns about enforcement and proof difficulties (Resp. Br. 35-36) are no different in PVPA cases than for any factual issue routinely tried by courts.

#### **E. There Are No Prior Interpretations Of Section 2543 To Which This Court Owes Deference**

The Winterboers' attempt to cite prior judicial support for their position is misleading. No such authority exists. Indeed, the Federal Circuit viewed this case as one of first impression. Pet. App. 4a. Moreover, the opinions cited by the Winterboers from *Asgrow Seed Co. v. Kunkle Seed Co.*, No. 86-3138-A (W.D. La. 1987), *aff'd*, 845 F.2d 1034 (Fed. Cir. 1988), are nonprecedential and only addressed whether Kunkle's "primary farming occupation" was the growing of crops for nonreproductive purposes. That case later concluded with a permanent injunction against the defendant and the payment of damages to Asgrow.

The Winterboers also claim that documents from the Department of Agriculture are entitled to deference from this Court as prior interpretations of section 2543 by the agency charged with administering the PVPA. Resp. Br. 25, 27. However, neither the Department of Agriculture nor the Plant Variety Protection Office ("PVPO") were given any regulatory authority by Congress over the PVPA's infringement provisions.<sup>5</sup> See 7 U.S.C. § 2326.

<sup>5</sup> The PVPA is like the patent and trademark laws in these respects. The United States Patent and Trademark Office ("PTO"), by the Commissioner of Patents, has statutory authority to grant and issue patents and register trademarks that meet the statutory requirements. However, the PTO has no jurisdiction or rulemaking



Jurisdiction over infringement lies exclusively in the district courts. *See* 7 U.S.C. § 2561; 28 U.S.C. § 1338(a).

The Winterboers urge this Court to “assume” that the Department of Agriculture was informed that it could not issue regulations to define what is exempted under section 2543 because such regulations would have conflicted with the plain language of the statute. Resp. Br. 27 (citing JA20). Not only does the cited document not interpret section 2543, it confirms that the Department of Agriculture has no authority concerning section 2543. For that reason, even if the 1973 “interpretation” from a letter by a PVPO Commissioner quoted at Resp. Br. 25 was an agency regulation, it is not entitled to any deference. *See, e.g., Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-04 (1979).

The only authorized views of the Department of Agriculture as to the quantitative limits in section 2543 on sales of protected seed are set forth at U.S. Brief 10-21 & n.20, which fully support Asgrow’s interpretation. Moreover, the fact that Congress has not clarified the quantitative limits in section 2543 does not show that Congress was aware of, adopted, or ratified the erroneous views of the various commentators that conflicted with the statute. *See Demarest*, 498 U.S. at 190; *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) (“This Court generally is reluctant to draw inferences from Congress’ failure to act.”).<sup>6</sup>

---

authority over issues or actions involving the infringement of patents or trademarks. *See* 35 U.S.C. § 6.

<sup>6</sup> Congress is progressing with legislation that will amend section 2543 to eliminate any right to sell seed for reproductive purposes with respect to any new varieties protected by PVPA certificates applied for more than 180 days after enactment of the amendments. *See* Pet. Br. 42-44 & nn.30-31.

#### F. The Respondents’ Other Attempts To Avoid Liability Are Irrelevant

The Winterboers suggest that the various ways of interpreting section 2543 that have been offered or reached at different stages of this case provide evidence that Asgrow’s current explanation is incorrect. Asgrow has always asserted that section 2543 limits sales of protected seed to what would be needed to produce another crop on the seller’s farm. Admittedly, Asgrow’s analysis has evolved over the course of this lawsuit, but so has that of the Winterboers.<sup>7</sup> Such clarification of legal positions along the path to this Court certainly does not alter this Court’s task of determining the proper statutory meaning as a matter of law. *See Federal Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (“courts are the final authorities on issues of statutory construction”).

The assertion at Resp. Br. 32-34 that “brown baggers” do not compete with the PVPA certificate owners is simply false. The American Seed Trade Association provides ample evidence of the disastrous effects that illegal brown bag seed sales have had on the operations and sales of many different breeders producing many different novel varieties. ASTA Brief 10-15. Without question, every bushel of Asgrow seed sold by the Winterboers or other “brown baggers” is a bushel of seed that cannot be sold by Asgrow or its representatives.

In a more curious attempt to avoid liability, the Winterboers claim that their Asgrow seed is inferior and not subject to the same warranties and quality controls as

---

<sup>7</sup> Indeed, the Winterboers are still trying to change the undisputed facts. The only evidence before the district court was that the Winterboers sold nearly all of their Asgrow soybeans as seed. They now assert that testimony was “mistaken” and that less than half of their Asgrow crops were sold as seed. Resp. Br. 4 n.3. This belated attempt to avoid liability under the Federal Circuit’s statutory construction should be ignored. Moreover, when section 2543 is properly interpreted, that factual revision is also irrelevant.

the seed produced and sold by Asgrow. Resp. Br. 32-33. While their after-the-fact claim of inferiority is a telling admission, it is also irrelevant. Even if true, it does not and cannot excuse their infringement. See, e.g., *Shamrock Technologies, Inc. v. Medical Sterilization, Inc.*, 903 F.2d 789, 792 (Fed. Cir. 1990) (inefficient infringement is still infringement); *Laitram Corp. v. Cambridge Wire Cloth Co.*, 863 F.2d 855, 859 & n.11 (Fed. Cir. 1988). *cert. denied*, 490 U.S. 1068 (1939).

The assertion that the Winterboers' "brown bag" seed sales were "so robust" (Resp. Br. 34) only because there was a shortage of Asgrow's protected soybean seed in the area of Iowa supplied by the Winterboers is also irrelevant. Even if that is proven, a shortage of Asgrow seed cannot excuse or justify the infringement of Asgrow's exclusive statutory rights by the Winterboers. A PVPA certificate gives its owner the right "to exclude others from selling the variety, or offering it for sale, or reproducing it . . . as provided in this chapter." 7 U.S.C. § 2483. Whether or not enough Asgrow seed was available, the very essence of the exclusive rights granted by the Act entitles Asgrow to prevent all unauthorized sales of its protected seed by others.

Even if Asgrow's protected varieties were opened to use by others by the Secretary of Agriculture under 7 U.S.C. § 2404, reasonable remuneration would be due Asgrow. In stark contrast, the Winterboers are selling Asgrow's seed without compensation to Asgrow at all. The PVPA simply was not designed to allow a farmer to sexually multiply a protected variety in order to sell seed in commercial quantities in unfair competition with the certificate owner, nor did Congress intend to provide a vehicle by which traditional farmers would be tempted to become seed dealers in protected varieties.

### G. The Policy And Constitutional Challenges To The PVPA Are Misplaced And Meritless

The Winterboers and their amici offer various policy assertions as to why the PVPA should not have been enacted or why the statutory standards for PVPA certification do not justify giving exclusive "patent-like" rights to breeders of sexually-reproduced plants. Resp. Br. 2-3; RAFI Brief 25-28. Such policy attacks on the PVPA are wholly misplaced. The wisdom of the PVPA legislation and the propriety of its standards and provisions are clearly matters to be addressed only by Congress.

In any event, if the differences between Asgrow's PVPA soybean varieties and other available soybeans were truly meager or resulted only from "cosmetic" changes, Asgrow could not sell its PVPA seed at a higher price than that of unprotected seed. Farmers would simply buy or save the seed of the unprotected varieties. Of course, that is not the case at all. Instead, new varieties will be successful in the marketplace because they have significantly higher yields and increased disease resistance. Despite higher initial seed costs, farmers are still able to earn more overall than with the unprotected public varieties.

The Winterboers admit that the demand for Asgrow's PVPA seed was high. Resp. Br. 34. Thus, their current claim that Asgrow's protected varieties lack distinctiveness and are not improvements over existing soybean varieties rings hollow. It is the very success of and demand for the Asgrow varieties that allows "brown baggers" such as the Winterboers to take advantage of that demand by selling "brown bag" Asgrow seed to other farmers.

Finally, the constitutionality of the PVPA need not be addressed. See Brief of Ted Cook As Amicus Curiae In Support Of Respondents, at 5-16. That issue was not raised or considered below nor raised by the respondents in this Court. E.g., *Robertson v. Seattle Audubon So-*



ciety, 112 S. Ct. 1407, 1415 (1992). An amicus curiae cannot expand the issues to be considered. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). Moreover, constitutional issues are to be avoided when resolution of such issues is not necessary for disposition of a case. *In re Snyder*, 472 U.S. 634, 642 (1985). In any event, such challenges are meritless. Indeed, the constitutional authority for the PVPA under the commerce clause is beyond legitimate question. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 118-28 (1942); cf. *United States v. Frame*, 885 F.2d 1119, 1125-27 (3d Cir. 1989) (rejecting commerce clause challenge to the Beef Promotion and Research Act, 7 U.S.C. §§ 2901-11), *cert. denied*, 493 U.S. 1094 (1990).

## II. THE NOTICE PROVISION IN SECTION 2541(6) IS APPLICABLE TO ALL SALES OF PVPA SEED PERMITTED UNDER SECTION 2543

The Winterboers claim that giving notice under section 2541(6) is not required when seed is sold in accordance with section 2543, but their conclusory analysis fails to explain how section 2543 "clearly provides otherwise" with respect to the requirements of section 2541(6). Resp. Br. 41-42. As shown by *Asgrow*, the Federal Circuit misconstrued the opening clause of section 2543 as exempting subsections (1), (2), (5), (6), (7) and (8) of section 2541 from applying when seed is sold under section 2543. Pet. App. 13a. Instead, that opening clause only limits the quantity of a person's authorized crop that can later be sold as "such saved seed." Pet. Br. 36; see *supra* section I.A. Thus, the opening clause cannot be the source for an exemption from the notice requirement for sales of "such saved seed."

What the PVPA recognized in the "right to save seed" provision in the first sentence of section 2543 was the pragmatic practice of farmers saving enough seed from their crop to replant their own farms. See Pet. App. 32a. What Congress allowed was the sale of "such saved seed"

when the farmer that saved the seed later had a change of plans and no longer needed that seed to produce a crop on his farm. Under that provision, no portion of a farmer's crop would be wasted but no incentive would be created to cause the farmer to save more seed than would be needed to produce another crop on his farm. However, Congress did not need to exempt all of section 2541 in section 2543, it only needed to exempt those parts of section 2541 that would otherwise foreclose selling the novel variety for reproductive purposes.

### A. Congress Only Exempted Sales When It Provided That It Shall Not Infringe Any Right To Sell Such Saved Seed

Under section 2541(1), "to sell the novel variety" infringes the rights of the certificate owner. Pet. App. 40a. That prohibition was negated when Congress stated in the proviso that "it shall not infringe any right hereunder . . . to sell such saved seed." *Id.* at 41a (emphasis added). However, only removing the prohibition in section 2541(1) to selling the novel variety would not have been sufficient to allow sales of "such saved seed." Under section 2541(3), it also infringes to sexually multiply the novel variety as a step in marketing it for growing purposes, which covers producing any protected seed that is later sold. *Id.* at 40a. Thus, Congress negated that prohibition by stating in the proviso that "such saved seed" could be sold "without regard to the provisions of section 2541(3) of this title." *Id.* at 41a. However, that is the only extent to which Congress nullified application of section 2541 to sales of "such saved seed" made under the first sentence of section 2543.

The Solicitor General asserts that the portion of the proviso in section 2543 stating that "it shall not infringe any right hereunder" for a qualified farmer to sell "such saved seed" to other farmers for reproductive purposes means that sales of "such saved seed" are not acts of infringement under any subsection of section 2541, in-

cluding subsection (6). U.S. Brief 24. However, that construction violates the fundamental canon that statutes are not to be interpreted in a manner that would render part of their language inoperative, superfluous, or meaningless. *See, e.g., United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992); *Freytag v. Commissioner*, 111 S. Ct. 2631, 2638 (1991).

If it were correct that the phrase "it shall not infringe any right hereunder" in the proviso of section 2543 meant that no subsection of section 2541 applies when "such saved seed" is sold in accordance with the proviso, Congress would have had no reason to include the "without regard to the provisions of section 2541(3)" clause in the same proviso. Even without that second reference to section 2541(3) in the proviso, any violations of section 2541(3) arising out of the sale of "such saved seed" would be excused along with all other violations of section 2541 by the "it shall not infringe any right" language. Thus, in order to avoid rendering the "without regard to the provisions of section 2541(3)" phrase in the proviso superfluous, the phrase "it shall not infringe any right hereunder . . . to sell such saved seed" must be construed as creating a limited exemption only for the sales of "such saved seed" expressly authorized by the proviso. Pet. App. 41a (emphasis added).

Sales of "such saved seed" under the proviso can be made "without regard to the provisions of section 2541(3)" because the proviso states so expressly. Pet. App. 41a. No other subsection is listed. However, even though Congress did not include section 2541(1) in that clause, its prohibition against *selling* the novel variety is not violated by sales made in accordance with section 2543 because the proviso expressly states that persons whose primary farming occupation is growing crops for nonreproductive purposes may "sell such saved seed" in accordance with state law. *Id.* (emphasis added). In that manner, Congress nullified sections 2541(1) and 2541(3) to the extent they would otherwise prevent sales of "such

saved seed" under section 2543, but kept the rest of section 2541, including subsection (6), applicable to all sales of PVPA-protected seed, including any sales of "such saved seed" permitted by section 2543.

**B. Congress Did Not Allow Or Intend For Any Protected Seed To Be Used To Produce A Hybrid Or Different Variety**

Asgrow submits that the proper interpretation of section 2543 with respect to the "notice" issue can be illustrated by tracing Congress' treatment of section 2541(4) in contrast to its treatment of section 2541(3). Paralleling the first reference to section 2541(3), the reference to section 2541(4) in the opening clause of section 2543 means a person may not save seed produced by him if such action might constitute an infringement of subsection 2541(4), *i.e.*, it would be used for producing a hybrid or different variety therefrom. Thus, just like sexually multiplying the variety as a step in marketing for growing purposes is excluded as a reason for producing seed to be saved under section 2543, saving seed for use in producing a hybrid or a different variety is prohibited as well.

In the proviso, Congress then allowed "such saved seed" to be sold by and to certain farmers "without regard to the provisions of section 2541(3)." Pet. App. 41a. By so doing, Congress permitted "such saved seed" to be sold under certain conditions even though it had been sexually multiplied as a step in marketing the variety for growing purposes. Pet. Br. 24-26. However, there is no "second" reference to section 2541(4) in the proviso to parallel the second reference to section 2541(3). Congress must have done that for a reason. Based on the express exemption of sections 2541(3) and 2541(4) in the first clause and the lack of a second reference to section 2541(4) in the proviso, Congress clearly did not intend for any "such saved seed" to be sold for use in producing a hybrid or different variety. *See Keene Corp.*



*v. United States*, 113 S. Ct. 2035, 2040 (1993) (where Congress includes language in one section of a statute but omits it in another, Congress is presumed to act intentionally).

Viewed in that light, the interpretation offered by the Solicitor General would clearly frustrate Congress' design to prevent a protected variety from being used in producing a hybrid or a different variety. If that construction were accepted, "such saved seed" could lawfully be sold for use in producing a hybrid or different variety, even though Congress declined to state explicitly that any seed sales made under the proviso could be made without regard to the provisions of section 2541(4). Congress cannot be presumed to have created a statutory exemption by implication where it declined to do so expressly. *See, e.g., Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989). Moreover, that reasoning applies with equal force to show that subsections (2), (5), (6), (7) and (8) of section 2541 also are not exempted. *See* Pet. Br. 33-34.

**C. Section 2543 Should Be Narrowly Construed To Further Congress' Purpose Of Requiring Notice In All PVPA Seed Transactions**

Exemptions from comprehensive statutory schemes should be narrowly construed in light of the plain meaning of the statute and the intent of Congress. *See, e.g., Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Subsections (1) and (6) are distinct provisions which foreclose different acts of infringement which are separate and independent violations of a certificate owner's rights. *See* Pet. Br. 34 & n.26. Thus, the mere fact that Congress authorized certain sales of "such saved seed" in section 2543 does not lead to the conclusion that Congress intended for the protected seed involved in such sales to be dispensed without notice, particularly where the lack

of notice on such sales would cause immense problems in PVPA compliance and enforcement.

If notice were not required on sales of "such saved seed" under section 2543, an "innocent" farmer that purchases PVPA seed sold without section 2541(6) notice might later violate the owner's PVPA rights without knowing that such rights attached to his seed. If section 2543 is interpreted so that sales of "such saved seed" are not required to be accompanied by section 2541(6) notice, a bona fide purchaser of such seed may be subject to liability upon receiving notice of the owner's rights despite there being no requirement that such notice be given in the first place. Narrowly construing the proviso in section 2543 so as to provide only the exemptions from section 2541 that are needed to allow sales of "such saved seed" between qualified farmers is consistent with the language and policy of the PVPA, and would prevent the "innocent" farmer problem because all persons would get notice (or the seller would be liable for omitting it).

Asgrow agrees with the respondents and the United States that sales of "such saved seed" under section 2543 are not authorized by the certificate owner. Asgrow further agrees that section 2567 should not foreclose infringement remedies against a purchaser of PVPA seed sold under section 2543. Asgrow's concern in this regard was that the last sentence of section 2567 might prompt district judges not to enforce an owner's PVPA rights against farmers claiming not to have received actual notice of such rights. Any potential problems of proof or difficulties in balancing the equities between a PVPA owner and an "innocent" purchaser will be avoided if *all* PVPA seed—whether authorized, saved, or brown bag—is required to be transferred with section 2541(6) notice. Asgrow submits that is exactly what Congress provided in the Act.

**CONCLUSION**

For the foregoing reasons, and those in the petitioner's opening brief, this Court should reverse the decision of the Federal Circuit.

Respectfully submitted,

*Of Counsel:*

BRUCE STEIN  
SIDNEY B. WILLIAMS, JR.  
THE UPJOHN COMPANY  
7000 Portage Road  
Kalamazoo, Michigan 49001  
(616) 323-4000  
LAWRENCE C. MAXWELL  
MARY ELLEN MORRIS  
TRABUE, STURDIVANT & DEWITT  
511 Union Street  
Nashville, Tennessee 37219  
(615) 244-9270

RICHARD L. STANLEY  
*Counsel of Record*  
JOHN F. LYNCH  
ARNOLD, WHITE & DURKEE  
750 Bering Drive  
Suite 400  
Houston, Texas 77057  
(713) 787-1400  
*Counsel for Petitioner*  
*Asgrow Seed Company*



No. 92-2038

FILED

JUN 10 1994

OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1993

ASGROW SEED COMPANY, PETITIONER

v.

DENNY WINTERBOER AND BECKY WINTERBOER,  
d/b/a DEEBEES

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE  
SUPPORTING PETITIONER**

DREW S. DAYS, III  
*Solicitor General*

FRANK W. HUNGER  
*Assistant Attorney General*

EDWIN S. KNEEDLER  
*Deputy Solicitor General*

RICHARD H. SEAMON  
*Assistant to the Solicitor General*

BARBARA C. BIDDLE

WENDY M. KEATS  
*Attorneys*

*Department of Justice  
Washington, D.C. 20530  
(202) 514-2217*

## QUESTIONS PRESENTED

The Plant Variety Protection Act (PVPA or Act), 7 U.S.C. 2321 *et seq.*, generally grants the breeder of a novel variety of a sexually reproduced plant the exclusive right to sell that variety for an 18-year period. That right is enforceable by a civil action for infringement in federal district court. The PVPA exempts from infringement liability, however, certain sales of "saved seed" between farmers. 7 U.S.C. 2543. The questions presented are:

1. Whether the Federal Circuit correctly interpreted the "saved seed" exemption to allow farmers to sell up to half of each crop they produce from a PVPA-protected variety to other farmers for use as seed.

2. Whether a sale of seed pursuant to the "saved seed" exemption must comply with the requirement in 7 U.S.C. 2541(6) (1988) that, in order for a sale to be non-infringing, the seller must provide notice of the seed's status as a protected variety.



## TABLE OF CONTENTS

	Page
Interest of the United States .....	1
Statement .....	2
Summary of argument .....	9
Argument:	
I. 7 U.S.C. 2543 permits a farmer to sell, for use as seed, only the portion of a crop produced from PVPA-protected seed that the farmer saved for the purpose of planting another crop .....	10
II. 7 U.S.C. 2543 exempts sales of saved seed from the notice requirement in Section 2541(6) .....	22
Conclusion.....	28

## TABLE OF AUTHORITIES

### Cases:

<i>Conroy v. Aniskoff</i> , 113 S. Ct. 1562 (1993) .....	17
<i>Federal Deposit Insurance Corp. v. Meyer</i> , 114 S. Ct. 996 (1994) .....	12
<i>Kim Bros. v. Hagler</i> , 167 F. Supp. 665 (S.D. Cal. 1958), aff'd, 276 F.2d 259 (9th Cir. 1960) .....	2

### Treaty and statutes:

Act of May 23, 1930, ch. 312, 46 Stat. 376, 35 U.S.C. 161-164 .....	2-3
International Convention for the Protection of New Varieties of Plants, Oct. 23, 1978 .....	2
Patent and Plant Variety Protection Remedy Clarification Act of 1992, Pub. L. No. 102-560, 106 Stat. 4231 .....	4
Plant Variety Protection Act of 1970, 7 U.S.C. 2321 <i>et seq.</i> .....	2
7 U.S.C. 2330(b)(1) .....	4
7 U.S.C. 2401(a) .....	3
7 U.S.C. 2401(f) .....	2
7 U.S.C. 2402(a) .....	3
7 U.S.C. 2421 .....	3

(III)

## IV

## Statutes—Continued:

	Page
7 U.S.C. 2443 .....	3
7 U.S.C. 2461 .....	3
7 U.S.C. 2462 .....	3
7 U.S.C. 2481 .....	3
7 U.S.C. 2482 .....	2, 3, 4
7 U.S.C. 2483(a) .....	3, 17
7 U.S.C. 2541 (1988) .....	3, 4, 6
7 U.S.C. 2541(1) (1988) .....	3, 6, 7, 25
7 U.S.C. 2541(3) (1988) .....	<i>passim</i>
7 U.S.C. 2541(4) (1988) .....	4, 11, 12
7 U.S.C. 2541(6) (1988) .....	<i>passim</i>
7 U.S.C. 2543 .....	<i>passim</i>
7 U.S.C. 2561 .....	5
7 U.S.C. 2563 .....	6
7 U.S.C. 2564(a) .....	6
7 U.S.C. 2565 .....	6
7 U.S.C. 2567 .....	4, 6, 26, 27
7 U.S.C. 2581 .....	2, 17
7 U.S.C. 1301(b)(6)(C) .....	13
7 U.S.C. 2116(g) .....	13
7 U.S.C. 2702(l) .....	13
7 U.S.C. 3002 .....	13
7 U.S.C. 4302(12) .....	13
7 U.S.C. 4602(13) .....	13
7 U.S.C. 6102(8) (Supp. IV 1992) .....	13
7 U.S.C. 6202(7) (Supp. IV 1992) .....	13
7 U.S.C. 6302(8) (Supp. IV 1992) .....	13
16 U.S.C. 796(19) .....	13
28 U.S.C. 1295(a)(1) .....	3, 5
28 U.S.C. 1338(a) .....	3, 5

## Miscellaneous:

115 Cong. Rec. 31,282 (1969) .....	17, 19
116 Cong. Rec. (1970):	
p. 34,679 .....	19
p. 34,680 .....	18
p. 40,296 .....	18
H.R. 13,631, 91st Cong., 1st Sess. (1969) .....	19

## V

## Miscellaneous—Continued:

	Page
H.R. 2927, 103d Cong., 1st Sess. (1993) .....	27
H.R. Rep. 1605, 91st Cong., 2d Sess. (1970) .....	19, 24
<i>Plant Variety Protection: Hearing on H.R. 13424, etc., Before the Subcomm. on Departmental Operations of the House Comm. on Agriculture, 91st Cong., 2d Sess. (1970)</i> .....	2, 6
S. 3070, 91st Cong., 1st Sess. (1969) .....	19
S. 1406, 103d Cong., 1st Sess. (1993) .....	27
S. Rep. No. 1138, 91st Cong., 2d Sess. (1970) .....	3, 19, 24
<i>The Random House Dictionary of the English Language (2d ed. 1987)</i> .....	13
USDA, Economic Research Service, <i>Agricultural Econ- omic Report No. 654</i> (1991) .....	21
<i>Webster's Third New International Dictionary</i> (1986) .....	12



**In the Supreme Court of the United States**

OCTOBER TERM, 1993

---

No. 92-2038

ASGROW SEED COMPANY, PETITIONER

*v.*

DENNY WINTERBOER AND BECKY WINTERBOER,  
d/b/a DEEBEES

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT*

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE  
SUPPORTING PETITIONER**

---

**INTEREST OF THE UNITED STATES**

This case concerns the scope of the "saved seed" exemption in the Plant Variety Protection Act, 7 U.S.C. 2543. The Federal Circuit held that, under that exemption, a farmer may sell up to 50% of a crop produced from a novel variety of seed to other farmers for use as seed, even though the sale would otherwise infringe the rights accorded under the Act to the owner of the novel variety. The Federal Circuit further held that, with respect to sales permitted under the saved seed exemption, the selling farmer need not provide notice to the purchasing farmer that the seed is a novel variety protected under the

Act, even though notice would otherwise be required. This Court granted certiorari to review both holdings.

The United States has a substantial interest in the questions presented here. The Department of Agriculture is responsible for issuing certificates of plant variety protection to the owners of novel varieties. 7 U.S.C. 2482. The effectiveness of those certificates in promoting the purpose of the Act—which is to “afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties,” 7 U.S.C. 2581—depends to a significant extent on the proper interpretation of the scope of the saved seed exemption. In addition, the United States is a member of the 1978 International Convention for the Protection of New Varieties of Plants, Oct. 23, 1978. The United States has an interest in the proper interpretation of the PVPA, as it covers the same subject. At the Court’s invitation, the United States filed a brief *amicus curiae* at the petition stage of this case.

### STATEMENT

1. The Plant Variety Protection Act of 1970 (PVPA or Act), 7 U.S.C. 2321 *et seq.*, grants patent-like protection to the breeders of novel varieties of sexually reproduced plants. Sexually reproduced plants are those produced by seed, rather than by asexual methods such as grafting, budding, and cuttings. 7 U.S.C. 2401(f); see *Kim Bros. v. Hagler*, 167 F. Supp. 665, 667 (S.D. Cal. 1958), *aff’d*, 276 F.2d 259 (9th Cir. 1960); *Plant Variety Protection: Hearing on H.R. 13424, etc., Before the Subcomm. on Departmental Operations of the House Comm. on Agriculture*, 91st Cong., 2d Sess. 41 (1970) [hereinafter *House Hearing*]. A number of major agricultural crops in the United States are sexually reproduced, including soybeans, cotton, wheat, barley, oats, and rice. *House Hearing* 9.<sup>1</sup>

<sup>1</sup> Asexually reproduced plants are afforded patent protection under a separate statute enacted in 1930. Act of May 23, 1930, ch. 312, 46 Stat.

Under the PVPA, the breeder of a novel variety of a sexually reproduced plant may apply to the Secretary of Agriculture for a certificate of plant variety protection. 7 U.S.C. 2421; see also 7 U.S.C. 2402(a). The application must show that the variety has (1) “[d]istinctness” from existing varieties; (2) “[u]niformity in the sense that any variations are describable, predictable, and commercially acceptable”; and (3) “[s]tability,” in the sense that the variety, when reproduced, generally “will remain unchanged with regard to its essential and distinctive characteristics.” 7 U.S.C. 2401(a). The application is ruled upon by the Plant Variety Protection Office (PVPO) established within the Department of Agriculture. 7 U.S.C. 2481, 2482.<sup>2</sup>

A certificate of plant variety protection covers “seed, transplants, and plants” of the novel variety. 7 U.S.C. 2401(a). It certifies that the owner of the variety has the right, for a period of 18 years:

to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom, to the extent provided by this chapter.

7 U.S.C. 2483(a). A separate section of the Act, 7 U.S.C. 2541, specifies that it infringes an owner’s rights to:

(1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or

376, 35 U.S.C. 161-164; see also S. Rep. No. 1138, 91st Cong., 2d Sess. 1 (1970) (1930 Act and PVPA provide “[s]imilar protection”).

<sup>2</sup> If the application is “refused” (*i.e.*, denied) by the PVPO, the applicant may appeal to the Secretary and, if dissatisfied with the Secretary’s decision, may seek judicial review in federal court. 7 U.S.C. 2443. Judicial review of the Secretary’s decision is available in either the United States District Court for the District of Columbia or the Federal Circuit. 7 U.S.C. 2461, 2462; 28 U.S.C. 1338(a). Appeals from district court decisions in such cases lie exclusively in the Federal Circuit. 28 U.S.C. 1295(a)(1).



solicit an offer to buy it, or any other transfer of title or possession of it;

\* \* \* \* \*

(3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or

(4) use the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom; or

\* \* \* \* \*

(6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received.<sup>3</sup>

The Act separately provides for public notice of the owner's rights by requiring certificates to "be recorded in the [PVPO]," 7 U.S.C. 2482, and by authorizing the Secretary to "establish public facilities for the searching of plant variety protection records and materials," 7 U.S.C. 2330(b)(1). The Act also authorizes owners to "give notice to the public" by labelling seed or seed containers "with \* \* \* the words 'Unauthorized Propagation Prohibited' or the words 'Unauthorized Seed Multiplication Prohibited' and after the certificate issues, such additional words as 'U.S. Protected Variety.'" 7 U.S.C. 2567.

The provision of the Act primarily at issue in this case, Section 2543, describes certain actions that do not infringe certain of the owner's rights:

<sup>3</sup> Section 2541 was amended in 1992; the existing provision was designated subsection (a) and a subsection (b) was added. See Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4231. The new subsection is not relevant to the questions presented here and, for the sake of consistency with the opinions below and the other filings, we will refer hereafter to the 1988 version of 2541.

### § 2543. Right to save seed; crop exemption

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.

An owner whose rights have been infringed may bring a civil action against the infringer. 7 U.S.C. 2561. Jurisdiction over infringement actions lies exclusively in the federal district courts. 28 U.S.C. 1338(a). Appeals from decisions of the district courts in infringement actions lie exclusively in the Federal Circuit. 28 U.S.C. 1295(a)(1).

The court in an infringement action may award injunctive relief, damages, and, "in exceptional cases," attorney's

fees to the prevailing party. 7 U.S.C. 2563, 2564(a), 2565. The court's discretion to award damages is limited, however, "[i]n the event the novel variety is distributed by authorization of the owner and is received by the infringer" without labeling that indicates its protected status. 7 U.S.C. 2567. In that case, "no damages shall be recovered against such infringer by the owner \* \* \* unless the infringer has actual notice of [*sic*] knowledge that propagation is prohibited or that the variety is a protected variety, in which event damages may be recovered only for infringement occurring after such notice." *Ibid.*

2. Respondents Dennis and Becky Winterboer own a farm in Clay County, Iowa. In 1990, they planted 265 acres of soybeans on their farm, using two novel varieties of soybean. Both varieties were covered by certificates of plant variety protection assigned to petitioner Asgrow Seed Company. Pet. App. 4a, 16a, 35a; see also Pet. 4. The planting produced 10,529 bushels of soybeans suitable for seeding purposes, all of which the Winterboers sold to other farmers for use as seed. Pet. App. 4a, 35a; see Pet. 4-5. Such sales of harvested seed by one farmer to another for seeding purposes are known as "brown bag sales."<sup>4</sup>

Asgrow brought this infringement action against the Winterboers in the United States District Court for the Northern District of Iowa. Asgrow alleged that the Winterboers' brown bag sales of soybeans produced from Asgrow's two novel varieties violated 7 U.S.C. 2541(1), which prohibits the sale of a novel variety; 7 U.S.C. 2541(3), which prohibits the sexual multiplication of a novel variety as a step in marketing it for growing purposes; and 7 U.S.C. 2541(6), which prohibits the dis-

<sup>4</sup> Harvested soybeans can be used for reproduction purposes — i.e., as seed—or for consumption purposes, such as for animal feed or human consumption. See *House Hearing* 26. The PVPA uses several terms to describe the former type of use, including "growing purposes" (7 U.S.C. 2541), "reproductive purposes" (7 U.S.C. 2543), and "seeding purposes" (*ibid.*). There appears to be no difference in the meaning of those terms relevant to this case, and we therefore use the terms interchangeably.

persing of a novel variety without notice that the variety is protected under the Act. The Winterboers argued that the sales did not violate those provisions because they fell within the exemption in Section 2543. See Pet. App. 16a-18a.

The district court granted summary judgment in favor of Asgrow, holding that the Winterboers' sales were not exempt from infringement liability under Section 2543. Pet. App. 15a-26a. The court read the first sentence of Section 2543 to "allow[] a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent crop year." Pet. App. 21a. In the court's view, the farmer then may sell the seed that had been saved for replanting purposes, but no more, if the farmer's plans have changed—for example, because of a change in market conditions. *Id.* at 22a.

Because the Winterboers "admittedly have sold much more than" was necessary to replant their soybean acreage, Pet. App. 24a, the district court concluded that they had violated 7 U.S.C. 2541(1) and 2541(3).<sup>5</sup> The court permanently enjoined the Winterboers "from selling seed, except for saved seed, to other farmers," Pet. App. 24a, but it deferred ruling on damages, *id.* at 24a-25a.

3. The court of appeals reversed. Pet. App. 1a-14a. It concluded that "[t]he district court erred in \* \* \* read[ing] the crop exemption [in Section 2543] to limit brown bag sales of novel varieties to the maximum amount of seed the selling farmer would save to plant another crop of like size." Pet. App. 10a.<sup>6</sup>

<sup>5</sup> The court found it unnecessary to determine whether the Winterboers also had violated 7 U.S.C. 2541(6) by failing to provide notice of the protected status of the seed to the purchasers of their brown bag seed. Pet. App. 25a. Nonetheless, the court stated that it "interpret[ed]" 7 U.S.C. 2541(6) "to require that if a farmer does sell saved seed to another farmer he must label it as a protected variety." Pet. App. 17a n.2.

<sup>6</sup> The court of appeals believed that the source of the district court's error was its mistaken belief that the phrase "for seeding purposes" in



While rejecting the "ensuing crop limitation" adopted by the district court, the court of appeals did discern other limits on the sale of seed under Section 2543. Pet. App. 10a. First, the court of appeals held that "a farmer who purchases PVPA seed from another farmer cannot save any seed from the crop grown with brown bag seed." *Id.* at 6a. Second, the court noted that "[b]oth the buyer and seller of brown bag seed must be farmers," and that "their primary farming occupation \* \* \* must be to grow crops for sale as food or feed, rather than to grow crops for sale as seed." *Id.* at 7a. In the court's view, the determination of a farmer's "primary farming occupation" must be made "on a crop-by-crop basis." *Id.* at 8a. Under that approach, a farmer may sell up to (but not including) 50% of each crop produced from a PVPA-protected variety to other farmers for seeding purposes, as long as the farmer sells the rest of that crop for consumption purposes. *Ibid.*

Third, the court determined that the reference to Section 2541(3) in the opening clause of Section 2543 limits brown bag sales of seed by "clarify[ing] that the crop exemption does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541," Pet. App. 12a. The court believed that, in determining what conduct is proscribed under subsection (3), which provides that it is an infringement to sexually multiply a novel variety as a step in marketing it for growing purposes, "[a]n expansive reading of the term 'marketing' would swallow the entire crop exemption." *Ibid.* The court accordingly held that subsection (3) reaches only one "form of marketing"—"extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet.

---

the first sentence of Section 2543 modifies "saved," and thus restricts the purpose for which seed may be saved. Pet. App. 11a. Instead, the court of appeals explained, the phrase "for seeding purposes" modifies "obtained," and thus describes the purpose for which seed was originally obtained from the owner of the variety. *Id.* at 11a-12a.

App. 12a-13a. The court of appeals left it for the district court to decide on remand whether the Winterboers had engaged in that form of marketing. *Id.* at 13a.

Finally, the court of appeals rejected Asgrow's argument that brown bag sales are subject to Section 2541(6), which declares it to be an infringement to "dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety." 7 U.S.C. 2541(6). The court concluded that "Section 2543 \* \* \* exempts farmers who make limited brown bag sales from this requirement." Pet. App. 13a.<sup>7</sup>

### SUMMARY OF ARGUMENT

I. The Federal Circuit erred in holding that 7 U.S.C. 2543 permits a farmer to sell, for use as seed, up to 50% of each crop produced from a PVPA-protected variety of seed. Properly interpreted, Section 2543 permits a farmer to sell, for use as seed, only the portion of the crop that the farmer has saved for the purpose of planting another crop. By limiting the *purpose* for which a farmer may save seed, Section 2543 has the practical effect of limiting the *amount* of saved seed that a farmer may sell to the amount reasonably necessary for the same farmer to plant another crop.

Our interpretation reflects the most natural reading of the text of Section 2543. In particular, it gives effect to the reference in Section 2543 to Section 2541(3), by virtue of which a farmer may not save seed for the purpose of selling it as seed. That interpretation is buttressed by consideration of the PVPA as a whole, which makes it clear that Section 2543 carves out only a narrow exception to the otherwise exclusive rights granted to the owner of a novel variety.

---

<sup>7</sup> The court of appeals subsequently denied Asgrow's petition for rehearing and rejected its suggestion of rehearing en banc. Pet. App. 28a.

Our interpretation of Section 2543 also comports with the legislative history of the PVPA. That history indicates that Section 2543 was intended to permit a farmer to sell only seed that the farmer saved to plant another crop, but decided not to use because of a change in planting plans. The limits on sales of saved seed under Section 2543 discerned by the Federal Circuit, by contrast, find no support in the text or legislative history of the PVPA.

II. The Federal Circuit was correct in holding that sales under Section 2543 are exempt from Section 2541(6). Section 2541(6) states that, "[e]xcept as otherwise provided," it "shall be an infringement" of an owner's rights to dispense PVPA-protected seed in a form that can be propagated without giving notice of its protected status. Section 2543 "otherwise provide[s]": It states that the sale of protected seed authorized under Section 2543 "shall not infringe *any* right" granted by the Act. 7 U.S.C. 2543 (emphasis added). The plain language of Section 2543 thus exempts qualifying sales from the notice requirement in Section 2541(6).

### ARGUMENT

#### I. 7 U.S.C. 2543 PERMITS A FARMER TO SELL, FOR USE AS SEED, ONLY THE PORTION OF A CROP PRODUCED FROM PVPA-PROTECTED SEED THAT THE FARMER SAVED FOR THE PURPOSE OF PLANTING ANOTHER CROP

The Federal Circuit erred in holding that 7 U.S.C. 2543 permits a farmer to sell, for use as seed, up to 50% of each crop produced from a PVPA-protected variety of seed. The court started off on the right foot, however, by not accepting the Winterboer's interpretation of Section 2543. They had argued that the only limitation that Section 2543 imposes on brown bag sales is that the "primary farming occupation" of both the selling farmer and the buying farmer must be "the growing of crops for sale for other

than reproductive purposes." 7 U.S.C. 2543; see Resp. C.A. Br. 21-25; see also Br. in Opp. 14-15. The Federal Circuit correctly recognized that a further limitation on brown bag sales is imposed by the reference to Section 2541(3) in the opening clause of Section 2543. Pet. App. 12a. As discussed below, however, the court misunderstood what conduct is proscribed by Section 2541(3).

A. Although 7 U.S.C. 2543 is not a model of clarity, it is most naturally read to permit a farmer to sell, for use as seed, only the portion of a crop produced from PVPA-protected seed that the farmer has saved for the purpose of planting another crop. Thus, Section 2543 permits a farmer who originally set aside seed for replanting, but who no longer needs the seed because of a change in his or her planting plans, to sell it to another farmer for use as seed. By doing so, the farmer can avoid wasting the seed. Section 2543 does not, however, permit a farmer to save and sell seed from a crop that was produced from PVPA-protected seed for the very purpose of marketing (selling) it for use as seed. By limiting the *purpose* for which a farmer may grow and save seed, Section 2543 also, as a practical matter, limits the *amount* of seed that a farmer may lawfully sell to the amount reasonably necessary for the same farmer to produce another crop.

1. The first sentence of Section 2543 consists of two parts: an opening clause, followed by a proviso. The opening clause allows a farmer, subject to the restrictions set forth in subsections (3) and (4) of Section 2541, to save seed produced by the farmer from PVPA-protected seed. The proviso to the first sentence allows the farmer to sell "such saved seed" to other farmers for use as seed. The question in this case is: How much seed may be saved under the opening clause, so as to be sold to another farmer, for use as seed, under the proviso?

The answer to that question, we submit, is found in Section 2541(3). Section 2541(3) provides that it is an infringement to "sexually multiply the novel variety as a step in marketing (for growing purposes) the variety." 7



U.S.C. 2541(3). Section 2541(3) is relevant here because the opening clause of the first sentence of Section 2543 expressly provides that a farmer may neither "save" seed nor "use" it if to do so would constitute an infringement under Section 2541(3). Thus, as the court of appeals correctly recognized, Section 2543 "does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541." Pet. App. 12a.<sup>8</sup>

The reference to Section 2541(3) in the opening clause of Section 2543 limits the purpose for which a farmer may produce and save seed under the first sentence of Section 2543. Without that reference to Section 2541(3), the opening clause of Section 2543 would permit a farmer to save, for *any* purpose (including for resale as seed), whatever seed has been "produced by him from" PVPA-protected seed. By virtue of the reference to Section 2541(3), however, the farmer may not have "produced"—i.e., "sexually multipl[ied]"—the seed "as a step in marketing" it for use as seed. Thus, if the farmer does "produce[]" (and thereafter save) the seed for the purpose of "marketing" it as seed, the farmer's conduct constitutes an infringement under Section 2541(3), and therefore falls outside of the protection of Section 2543.

The Act does not define the term "marketing." In the absence of a statutory definition, it is appropriate to assign the word its common meaning. See, e.g., *Federal Deposit Insurance Corp. v. Meyer*, 114 S. Ct. 996, 1001 (1994). In common usage, "marketing" encompasses "selling."<sup>9</sup> The

<sup>8</sup> The opening clause of Section 2543 refers not only to Section 2541(3) but also to Section 2541(4), which declares it to be an infringement to use a novel variety in producing a hybrid or different variety. Because Asgrow has not alleged that the Winterboers violated Section 2541(4), that provision is not implicated in this case.

<sup>9</sup> In its narrower connotation, the term "marketing" is synonymous with "selling"; in its broader connotation, it includes activities related to preparing a product for sale. See *Webster's Third New International Dictionary* 1383 (1986) (defining "marketing" to mean (1) "the act of selling or purchasing in a market; \* \* \* (2) an aggregate of functions

same usage is also reflected in numerous statutory definitions of the term "marketing" in agricultural and other contexts.<sup>10</sup> Applying that meaning in Section 2541(3) leads to the conclusion that a farmer may not plant a PVPA-protected variety, and thereafter save the seed produced by the planting, with the purpose of selling the saved seed to others for use as seed. The farmer must act with some other purpose.<sup>11</sup>

involved in transferring title and in moving goods from producer to consumer including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and supplying market information"); *The Random House Dictionary of the English Language* 1177 (2d ed. 1987) (defining "marketing" to mean (1) "the act of buying or selling in a market \* \* \* (2) the total of activities involved in the transfer of goods from the producer or seller to the consumer or buyer, including advertising, shipping, storing, and selling").

<sup>10</sup> See 7 U.S.C. 1301(b)(6)(C) (defining "[m]arket" to mean "to dispose of peanuts \* \* \* by voluntary or involuntary sale, barter, or exchange, or by gift inter vivos"); 7 U.S.C. 2116(g) ("The term 'marketing' includes the sale of cotton or the pledging of cotton to the Commodity Credit Corporation as collateral for a price support loan."); 7 U.S.C. 2702(l) ("The term 'marketing' means the sale or other disposition of commercial eggs [and related products] \* \* \* in any channel of commerce."); 7 U.S.C. 4302(12) ("The term 'marketing' means the sale or other disposition in commerce of cut flowers [and related products]."); 7 U.S.C. 4602(13) (similar definition of "marketing" for honey and honey products); 7 U.S.C. 6102(8) (Supp. IV 1992) (similar definition of "marketing" for mushrooms); 7 U.S.C. 6202(7) (Supp. IV 1992) (similar definition of "marketing" for limes); 7 U.S.C. 6302(8) (Supp. IV 1992) (similar definition of "marketing" for soybeans and soybean products); see also 7 U.S.C. 3002 (defining "direct marketing from farmers to consumers" to mean "the marketing of agricultural commodities at any marketplace \* \* \* established and maintained for the purpose of enabling farmers to sell \* \* \* their agricultural commodities directly to individual consumers, or organizations representing consumers"); 16 U.S.C. 796(19) (defining "Federal power marketing agency" to mean "any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy").

<sup>11</sup> The court of appeals erred in concluding that Section 2541(3) prohibits only one "form of marketing"—namely, "extensive or coordinated selling activities, such as advertising, using an intervening sales

The purpose for which a farmer permissibly may produce and save seed from PVPA-protected seed is set forth in the opening clause of Section 2543. Under that clause, the farmer may "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section." 7 U.S.C. 2543. In other words, the farmer may use seed that has been produced from protected seed, and then saved, for the purpose of producing another crop. The farmer may then do either of two things with that subsequent crop: (1) use the crop on his or her own farm (for example, for animal feed, personal consumption, or replanting), or (2) sell the crop to others for consumption purposes, in accordance with the second sentence of Section 2543. Thus, although the ensuing *crop* may either be used on the farm or be sold to others, the use of the "saved seed" itself that is permitted by the opening clause of Section 2543 is limited to the "production of a crop."<sup>12</sup>

representative, or similar extended merchandising or retail activities." Pet. App. 12a-13a. There is no support for that conclusion in the text of Section 2541(3), which refers to "marketing" without qualification. Indeed, the text of Section 2541(3) covers not only all forms of marketing but also any "step" in the marketing process. Thus, far from barring only large-scale selling activities, Section 2541(3) bars all sales and activities preparatory to sales.

<sup>12</sup> The court of appeals misread the portion of the opening clause of Section 2543 that permits a farmer to "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section." The court of appeals believed that the phrase "for sale as provided in this section" modifies the word "seed," and the court accordingly read the clause in which the phrase appears to be the source of authority to sell saved seed. See Pet. App. 7a. In our view, however, the "for sale" phrase modifies the word "crop," so that the clause of which it is a part refers, not to the sale of the saved *seed* (a subject that is instead governed by the proviso to the first sentence of Section 2543), but to the sale of the *crop* produced from the saved seed (a subject that is further addressed by the second sentence of section 2543). This interpretation is supported by the grammatical structure of the sentence, which indicates that both prepositional phrases that begin

The sale of "saved seed" for use as seed is permitted under the proviso to the first sentence of Section 2543, which states:

*Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

By referring to "such saved seed," the proviso limits the seed that may be sold to the seed that has been saved under the opening clause. As discussed above, the opening clause does not permit seed to be produced and saved for the purpose of selling the seed for use as seed; instead, it permits seed to be produced and saved for the purpose of producing another crop. Therefore, the proviso permits a farmer to sell, for use as seed, only the seed that the farmer has produced, and thereafter saved, in order to produce another crop. Pet. App. 21a-24a.<sup>13</sup>

Although the permissibility of selling saved seed for use as seed thus turns on the purpose for which the farmer produced and saved the seed in the first place, we think

with "for" ("for sale [etc.]" and "for use [etc.]" should modify the noun ("crop") that immediately precedes them.

<sup>13</sup> Thus, we agree with the district court that Section 2543 permits a farmer to save seed only for the purpose of planting another crop. See Pet. App. 21a-22a. We reach that conclusion, however, by a different route. The district court based its conclusion on its view that the phrase "for seeding purposes" modifies the word "saved" and thus restricts the purpose for which seed may be saved. *Id.* at 21a. As the court of appeals determined, the phrase "for seeding purposes" does not modify "saved"; rather, it modifies "obtained," and refers to the purpose for which the seed was obtained by authority of the owner. *Id.* at 11a-12a. We trace the limitation on the purpose for which seed may be saved to Section 2541(3), based on the reference to Section 2541(3) in the opening clause of Section 2543:



that in infringement actions the courts ordinarily would not need to conduct an elaborate inquiry into the farmer's subjective intent at the time of planting and harvesting; it would be appropriate for a court to infer the farmer's purpose from the amount of seed that the farmer saved. If the farmer saved more seed than he or she reasonably could use to produce another crop, and thereafter sold that seed to others for use as seed, it would be reasonable to infer that the farmer produced the seed from the outset (and saved it) with the purpose of selling it to others for use as seed, in violation of Section 2541(3).<sup>14</sup> That inference would be especially well founded when, as in this case, the amount of seed that was saved and sold for seeding purposes exceeded by many times over the amount needed for replanting.<sup>15</sup>

<sup>14</sup> That is not to say that a farmer may save only the amount of seed necessary to produce a crop of the same size in the immediately ensuing crop season. As the district court explained, if the farmer planted only 500 acres of soybeans in one crop season, but planned to plant 1000 acres in the next crop season, the farmer could save enough seed to plant 1000 acres. Pet. App. 21a-22a. Moreover, a farmer would not be limited, under our interpretation, to saving only the amount of seed necessary for the immediately ensuing crop season; the farmer could save enough for his or her planting purposes for any number of ensuing seasons. According to one of the amici that appeared in the court of appeals, the growers of certain types of vegetables find it necessary to set aside from a single crop "as much as a four or five year supply" of seed for replanting purposes. Corrected Br. for Amicus Curiae Tanimura & Antle, Inc. 5.

<sup>15</sup> Assuming, as the district court did (Pet. App. 22a n.3) and as petitioner asserts (Pet. 3), that it takes one bushel of soybeans to plant one acre, the Winterboers would have needed to save 265 bushels of soybeans to produce a crop of the same size as the crop they produced in 1990. See Pet. App. 35a. The amount of soybeans that they actually saved, and sold as seed, was more than 38 times that amount: 10,529 bushels. *Ibid.* Although we do not believe that the Winterboers were limited to saving only enough seed to produce a crop of the same size in the immediately ensuing crop season, see note 14, *supra*, the Winterboers have never suggested that they originally saved more than 10,000 bushels of soybeans for the purpose of replanting 38 times

2. The interpretation of Section 2543 that we have offered above is buttressed by consideration of the PVPA as a whole. See *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1565 (1993) (meaning of statutory language depends on context). Congress enacted the PVPA to "afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties." 7 U.S.C. 2581; see also 115 Cong. Rec. 31,282 (1969) (statement of Sen. Miller). The primary form of encouragement provided by the Act is the grant of exclusive rights to the developers of new varieties for an 18-year period, including the exclusive right to sell, import, and export a protected variety. 7 U.S.C. 2483(a); see also 115 Cong. Rec. 31,282 (1969) (statement of Sen. Miller). Most of the PVPA is devoted to explicating those rights, defining what actions infringe them, and providing for their enforcement through a certification process and private infringement actions.

Section 2543 carves out an exception to the exclusive rights otherwise afforded by the PVPA. Consistent with that function, Section 2543 should be read to permit only those limited sales of saved seed by a farmer that are necessary to prevent wasting of the saved seed if the farmer's replanting plans change. That interpretation affords appropriate financial protection for the farmer. At the same time, it conforms to and protects the legitimate expectations of the owner of exclusive rights in the novel variety at the time it sold the seed to the farmer—namely that the seed the owner sold would be used to grow a crop that would in turn be used on the purchaser's farm or sold for consumption purposes, but that a limited amount of the crop the purchasing farmer would grow with the seed might be used as seed.

the amount of acreage they planted in 1990 or replanting the same amount of acreage as they planted in 1990 over the next 38 crop seasons.

As Judge Newman explained in dissenting from the denial of rehearing en banc, "[t]he statute was not designed to place farmers in the seed business." Pet. App. 32a; see also 116 Cong. Rec. 34,680 (1970) (remarks of Sen. Miller); *id.* at 40,296 (remarks of Rep. Poage). Our interpretation of Section 2543 is consistent with that view, because it does not permit farmers to plant a novel variety of seed for the purpose of producing seed to sell in competition with the owner of protected rights in the novel variety. The Federal Circuit's interpretation, in contrast, permits a farmer to do precisely that with up to half of each crop produced from protected seed.<sup>16</sup> By permitting farmers to make such extensive sales of seed, for use as seed, the Federal Circuit's interpretation "nullifies" the economic incentive that Congress intended the PVPA to provide for plant breeders to assume the costs and risks of developing new varieties. Pet. App. 30a (Newman, J., dissenting from denial of rehearing en banc). That interpretation thus thwarts the stated purpose of the PVPA.

B. The legislative history of Section 2543 likewise furnishes no support for the Federal Circuit's interpretation.

The original version of the bills that became the PVPA contained no provision allowing farmers to sell "saved seed" for seeding purposes. Instead, those bills included a "saved seed" provision, which allowed a farmer to save only

<sup>16</sup> In the case of soybeans, for example, in a single crop cycle a farmer could, under the Federal Circuit's interpretation, produce and sell, as seed, up to 22 and 1/2 times the amount of soybeans that the owner of the variety sold to the farmer (based on a yield of 45 bushels for each bushel planted). See Pet. App. 32a n.2. By comparison, as we interpret it, Section 2543 would generally permit a farmer to sell, as seed, no more than 1/45 (or about 2%) of the crop produced from a PVPA-protected variety of soybean, which would represent the same amount that the farmer purchased from the owner of the variety to produce the crop. See Pet. App. 11a; but cf. note 14, *supra* (farmer may save enough seed for replanting larger acreage and in more than one crop season).

enough of the seed produced from protected seed for replanting, and a separate "crop exemption" provision, which allowed farmers to sell the crop produced from protected seed for consumption (but not planting) purposes.<sup>17</sup>

The right to sell "saved seed" for seeding purposes was added to the final bill, when the "saved seed" and "crop exemption" provisions were combined into what became Section 2543. See 116 Cong. Rec. 34,679 (1970). As described in the committee reports, Section 2543

authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; to save seed from such crop for future use or planting on the farm; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed for reproductive purposes to other persons so engaged.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 12 (1970) (same). That description makes clear that under Section 2543 a farmer may sell, for seeding purposes, only such PVPA-descended seed as the farmer has saved for the farmer's own use. Thus, as the district court recognized, Congress contemplated only sales of limited amounts of seed, occasioned by

<sup>17</sup> Under the proposed "saved seed" provision, unless the seed was grown as a step in marketing seed or for producing a hybrid, a farmer could have saved seed from a PVPA crop "and grow[n] the resulting variety for his own use." S. 3070, 91st Cong., 1st Sess., § 112 (1969); H.R. 13,631, 91st Cong., 1st Sess., § 112 (1969); see also 115 Cong. Rec. 31,282 (1969) (reproducing S. 3070, as introduced). Under the proposed "crop exemption" provision, it would not have been an infringement to sell seed saved under the "saved seed" provision "for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose." S. 3070, *supra*, § 114; H.R. 13,631, *supra*, § 114.



a change in the selling farmer's planting plans. Pet. App. 22a.<sup>18</sup>

C. The Federal Circuit recognized that "without meaningful limitations, [Section 2543] could undercut much of the PVPA's incentives." Pet. App. 12a. The limitations the court adopted in response to that concern, however, find no support in the text or legislative history of the Act.

The Federal Circuit based its holding that a farmer may sell up to 50% of a crop as brown bag seed upon its interpretation of the requirement in Section 2543 that both the seller and buyer of the seed have, as their "primary farming occupation," the "growing of crops for sale for other than reproductive purposes." 7 U.S.C. 2543. The Federal Circuit adopted a "crop-by-crop" approach to determining whether that requirement is satisfied, reasoning that, as long as 50% or more of a farmer's particular crop is sold for non-reproductive purposes, the farmer's "primary farming occupation," with respect to that crop, is the growing of the crop for sale for non-reproductive purposes. Pet. App. 8a. Nothing in the text or legislative history of Section 2543, however, suggests that courts should use a crop-by-crop approach instead of, for example, an approach based on the primary source of the farmer's income.<sup>19</sup>

There is likewise no support in the text of Section 2543 for the court's determination that a farmer who purchases brown bag seed cannot save any portion of the seed produced from it. See Pet. App. 6a; p. 8, *supra*. Section

<sup>18</sup> The passage from the committee report quoted in the text, *supra*, could be read to contemplate that a farmer may sell, for use as seed, seed that has been saved not only for replanting, but also for use on the farm. No party, however, has supported such an interpretation of the statute, and we do not believe that such an interpretation can be squared with the text of the statute.

<sup>19</sup> The crop-by-crop approach was the court of appeals' own invention. The Winterboers argued in the court of appeals that to satisfy the "primary farming occupation" requirement, "a farmer need only sell the majority of his crop for consumption." Resp. C.A. Br. 24.

2543 permits a farmer to save seed "produced by him from seed obtained, or *descended from* seed obtained, by authority of the owner of the variety," 7 U.S.C. 2543 (emphasis added). Brown bag seed is plainly "descended from" seed obtained by authority of the owner.

As discussed above, the operative limitation on the amount of saved seed that a farmer may sell under Section 2543 is found in that Section's incorporation of the prohibition in Section 2541(3) against sexually multiplying a protected variety of seed as a step in marketing it for use as seed. The court of appeals erred by failing to give effect to that limitation, which is imposed by the Act itself, and by adopting other limitations that have no basis in the Act.<sup>20</sup>

<sup>20</sup> In support of their argument, the Winterboers heavily relied below on three documents obtained from the Department of Agriculture. See Resp. C.A. Br. 32-33 & n.21; Resp. C.A. Reply Br. 28-32. Their reliance on those documents (*reproduced at* J.A. 13-15, 20, 34-35) is misplaced. The earliest such document is a 1973 letter from a PVPO commissioner that sought to answer certain "hypothetical" questions and stated that the only limitation on brown bag sales is the requirement that the selling farmer's and buying farmer's "primary farming occupation" be the growing of crops for non-reproductive purposes. J.A. 13. The 1973 letter does not address the "marketing" prohibition in Section 2541(3) or indicate to what extent the author's view represented the position of the Department. The second document, a PVPO "Activity Report" from October 1987, concerned the Department's authority to issue regulations concerning the scope of Section 2543; the document said nothing about the meaning of Section 2543. J.A. 20. The third document is a report co-authored by a USDA agricultural economist and an outside economist, surveying "Intellectual Property Rights and the Private Seed Industry" (USDA, Economic Research Service, *Agricultural Economic Report* No. 654 (1991)). J.A. 34. That report referred (J.A. 34) to a district court decision for the proposition that under the PVPA, "49% of a harvest can be sold as seed." The report did not suggest that the Department had independently come to that view. Thus, none of the documents cited by respondents purported to reflect a formal agency determination regarding the question of statutory interpretation presented here. The court of appeals was correct not to rely on those documents or to accept the argument founded upon them. In any event, the Department has now carefully

## II. 7 U.S.C. 2543 EXEMPTS SALES OF SAVED SEED FROM THE NOTICE REQUIREMENT IN SECTION 2541(6)

In addition to addressing the scope of the "saved seed" exemption in Section 2543, the court of appeals addressed a further question: whether a farmer who sells saved seed under Section 2543 is required, by Section 2541(6), to give notice to the purchaser of the seed's protected status. Although the Court granted certiorari on the notice issue (the second question presented in the petition), the Court may decline to reach it. If the Court does reach it, however, the Court should affirm the court of appeals' holding (Pet. App. 13a) that sales of saved seed under Section 2543 are not subject to the notice requirement in Section 2541(6).

A. The district court found it unnecessary to decide whether the Winterboers' sales violated the notice requirement in Section 2541(6). Pet. App. 25a. The Winterboers accordingly did not raise the notice issue on appeal. The notice issue was, instead, raised for the first time on appeal in Asgrow's brief as appellee. Pet. C.A. Br. 35-38. Although the Winterboers joined the issue in their reply brief, they asserted at the same time that "notice is not at issue on this appeal." Resp. C.A. Reply Br. 16. Under those circumstances, it is doubtful that the issue was properly before the panel, as we indicated in our brief at the petition stage (at 20 n.17), and as Judge Lourie indicated in his concurring opinion below (Pet. App. 14a).

This Court need not address the notice issue if it reverses the court of appeals' holding on the first question presented. That disposition of the first question would, in effect, sustain the district court's holding that the Winterboers' sales did not fall within the saved seed exemption of Section 2543. See Pet. App. 24a (Winterboers

---

considered the questions presented here, and its views are those set forth in this brief.

"admittedly have sold much more than th[e] amount of seed" reasonably necessary for planting another crop of soybeans). It therefore would not be necessary to decide whether sales that *do* fall within Section 2543 must meet the notice requirement in Section 2541(6).

If the Court affirms the court of appeals' holding on the first question presented, the Court still might choose not to reach the notice issue, in view of the interlocutory posture of this case. See U.S. Br. on Pet. 19-20. The court of appeals remanded the case to the district court for proceedings on whether the Winterboers' sales qualified under Section 2543, as interpreted by the court of appeals. Pet. App. 13a. If this Court agrees with the court of appeals' interpretation, it may well be determined on remand that the Winterboers' sales do not fall within Section 2543. See U.S. Br. on Pet. 19 n.16. In that event (just as in the event that this Court reverses on the first question), it would be unnecessary to decide whether sales that *do* fall within Section 2543 must meet the notice requirement in Section 2541(6).

B. If the Court reaches the notice issue, its proper resolution is not free from doubt. On balance, however, we believe that the court of appeals was correct in holding that sales of saved seed under Section 2543 are exempt from the notice requirement in Section 2541(6). See Pet. App. 13a.

1. The court of appeals' holding, in our view, is supported by the language of the two statutory provisions.

Section 2541 provides in relevant part:

Except as otherwise provided in this subchapter, it shall be an infringement of the rights of the owner of a novel variety to perform without authority, any of the following acts \* \* \*:

\* \* \* \* \*

(6) dispense the novel variety to another, in a form which can be propagated, without notice as to



being a protected variety under which it was received[.]

Although subsection (6) is awkwardly worded, its import is clear enough: Unless "otherwise" provided in the Act, it is an infringement to dispense a novel variety without giving notice to the recipient of the variety's protected status.<sup>21</sup>

Section 2543 does appear to provide otherwise. Specifically, the proviso to the first sentence of Section 2543 states:

*Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

A sale of saved seed "for reproductive purposes" under the proviso plainly constitutes "dispens[ing] the novel variety to another, in a form which can be propagated." For that reason, such a sale, without the requisite notice, would be an infringement under subsection (6) of Section 2541, unless a different section of the Act provided otherwise. The proviso in Section 2543 provides otherwise by stating that such a sale "shall not infringe *any* right hereunder."

7 U.S.C. 2543 (emphasis added). The proviso thus appears to encompass *any* right recognized elsewhere in the Act, including the owner's right, recognized in subsection (6), not to have the novel variety dispensed without notice of its protected status. Thus, we believe that the proviso exempts qualifying sales from the notice requirement in subsection (6).

<sup>21</sup> See S. Rep. No. 1138, *supra*, at 12 (subsection 6 applies to "dispensation of the novel variety to another without notice that it is a protected variety"); H.R. Rep. No. 1605, *supra*, at 11 (same).

We recognize that there is language in the proviso that could be read to support a contrary conclusion. The proviso states that the sale of saved seed, for use as seed, is permitted "without regard to the provisions of section 2541(3)." That reference to Section 2541(3) could be read, in isolation, to mean that sales under the proviso are exempt only from infringement liability based on Section 2541(3), but not from infringement liability based on some other provision, such as Section 2541(6). That reading, however, is undermined by the immediately succeeding language in the proviso, just discussed, stating that sales under the proviso "shall not infringe *any* right" under the Act. The latter language indicates that the exemptive force of Section 2543 is not limited to the rights recognized in Section 2541(3).

In this connection, it is significant that even petitioner Asgrow, which argues for a narrow reading of Section 2543, assumes (Pet. 22) that the exemption from liability afforded by Section 2543 must extend, at least, not only to Section 2541(3)—which prohibits the sexual multiplication of a novel variety—but also to Section 2541(1)—which prohibits any sale or transfer of a protected variety. That assumption presumably is based on the view that, unless the proviso extends to Section 2541(1), all sales of saved seed under the proviso would be barred under Section 2541(1). If such sales were barred under Section 2541(1), then the proviso would not actually permit any sales of saved seed, contrary to its obvious purpose.

2. Asgrow nonetheless contends that sales of saved seed are subject to the notice requirement in Section 2541(6). In our view, its arguments in support of that contention are substantial but ultimately unpersuasive.

Asgrow's primary argument emphasizes that the proviso to the first sentence of Section 2543 authorizes only a *sale* of saved seed; therefore, Asgrow argues, Section 2543 provides an exemption from infringement liability only with respect to the provisions in Section 2541 that relate to *sales*—namely, Section 2541(1) and Section

2541(3). Asgrow takes the position that Section 2541(6) does not relate to sales, but rather to the giving of notice in connection with sales. Pet. 22. Asgrow's argument thus depends on treating a sale of seed, on the one hand, and the giving of notice in connection with the sale, on the other hand, as two distinct actions, only one of which is exempted from infringement liability under Section 2543.

The problem with that argument is that it rests upon the assumption that subsection (6) is not related to sales. Subsection (6) applies whenever one "dispense[s]" a novel variety in a form capable of propagation, including dispensing in the course of a sale. Thus, it does not accord with the language of subsection (6) to treat a sale (or any other transfer) of seed as distinct from the giving of notice in connection with the sale (or other transfer). Under subsection (6), the duty to give notice arises only upon a transfer of protected seed, including a transfer by sale.

Asgrow also has argued that "requiring notice on all seed sales, whether 'brown bag' seed or not, is consistent with Congress's intent in 7 U.S.C. § 2567 that a purchaser or user of the protected seed have actual notice of prohibited acts before being subject to damages for infringement." Pet. 23; see also Pet. C.A. Rehearing Pet. 15; Pet. C.A. Br. 37. That argument appears to depend on the assumption that, under Section 2567, a purchaser of brown bag seed may not be held liable for damages in an infringement action unless the owner of the variety proves that the purchaser had notice of the seed's protected status. That assumption, in our view, is unwarranted.

Section 2567 does not require the owner to prove that the infringer had notice of the seed's protected status in every infringement action. Section 2567 requires such proof only "[i]n the event the novel variety is distributed by authorization of the owner and is received by the infringer without" labeling or marking that indicates the seed's protected status. Thus, when a sale of brown bag seed occurs without the "authorization of the owner," it does not appear the owner must prove notice in order to

recover damages from the infringer.<sup>22</sup> The purchaser of "brown bag" seed, which typically is not labeled as protected, therefore could be held liable in damages for any infringing use of that seed, even if the purchaser did not have actual notice of the protected status of the seed, and even if the sale, though not authorized by the owner, was authorized by Section 2543.<sup>23</sup>

<sup>22</sup> If the owner authorized the sale, it is reasonable to require the owner to prove notice with regard to a sale of seed that is not labeled as protected. In that situation, the owner presumably is in a position to ensure that the seed is labeled as protected. When a sale of seed is not authorized by the owner, the owner presumably would not have that ability. But in that event, if the seed is not labeled as protected, the purchaser may be able to raise lack of notice in mitigation under the last sentence of Section 2567, which states: "As to both damages and injunction, a court shall have discretion to be lenient as to disposal of materials acquired in good faith by acts prior to such notice."

<sup>23</sup> As we discussed in our brief at the petition stage (at 17-19), bills have been proposed in each House of Congress that would amend Section 2543 by striking out the proviso to the first sentence of Section 2543, thereby eliminating the authority of farmers to sell saved seed to other farmers for use as seed. S. 1406, 103d Cong., 1st Sess. § 9 (1993); H.R. 2927, 103d Cong., 1st Sess. § 9 (1993). The Senate bill has been the subject of hearings before the Senate Committee on Agriculture, Nutrition, and Forestry, but it has not yet been reported out of that committee. A committee hearing on the House Bill began on May 24, 1994. For reasons discussed in our brief at the petition stage (at 18-19), enactment of the bills in their current form would not render this case moot.



**CONCLUSION**

With respect to the first question presented in the petition, the judgment of the court of appeals should be reversed. If the Court reaches the second question presented in the petition, it should affirm the judgment of the court of appeals with respect to that question.

Respectfully submitted.

DREW S. DAYS, III

*Solicitor General*

FRANK W. HUNGER

*Assistant Attorney General*

EDWIN S. KNEEDLER

*Deputy Solicitor General*

RICHARD H. SEAMON

*Assistant to the Solicitor General*

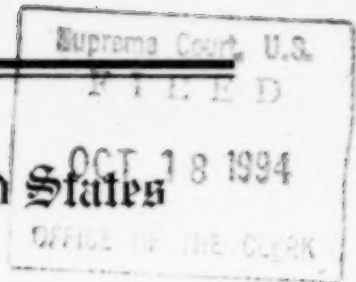
BARBARA C. BIDDLE

WENDY M. KEATS

*Attorneys*

JUNE 1994

18



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

ASGROW SEED COMPANY,  
*Petitioner,*  
v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

**SUPPLEMENTAL BRIEF FOR THE PETITIONER**

*Of Counsel:*

BRUCE STEIN  
THE UPJOHN COMPANY  
7000 Portage Road  
Kalamazoo, Michigan 49001  
(616) 323-4000

LAWRENCE C. MAXWELL  
MARY ELLEN MORRIS  
TRABUE, STURDIVANT & DEWITT  
511 Union Street  
Nashville, Tennessee 37219  
(615) 244-9270

RICHARD L. STANLEY  
*Counsel of Record*  
JOHN F. LYNCH  
ARNOLD, WHITE & DURKEE  
750 Bering Drive  
Suite 400  
Houston, Texas 77057  
(713) 787-1400  
*Counsel for Petitioner*  
*Asgrow Seed Company*

5 pp



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1994

---

No. 92-2038

---

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

---

**SUPPLEMENTAL BRIEF FOR THE PETITIONER**

---

Pursuant to Rule 25.5 of the Rules of this Court, Petitioner Asgrow Seed Company ("Asgrow") submits this supplemental brief to inform the Court of recently enacted legislation that prospectively amends the statutory provisions at issue in this case, but does not affect the issues before the Court.

This case presents two statutory interpretation questions arising from the Plant Variety Protection Act ("PVPA"), 7 U.S.C. §§ 2321-2581. The first question is how much seed of a novel plant variety protected under the PVPA may be sold for reproductive purposes under the terms of 7 U.S.C. § 2543. The second question is whether the seed sales authorized by section 2543 (whatever that amount is held to be) remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the pur-

chaser that the seed being sold is of a protected novel variety.

In its opening brief on the merits, Asgrow noted that legislation had been introduced to amend the PVPA "to make such Act consistent with the International Convention for the Protection of New Varieties of Plants of March 19, 1991, to which the United States is a signatory, and for other purposes."<sup>1</sup> Pet. Br. 42-44. At that time, Asgrow noted that the proposed legislation provided that "[t]he first sentence of section 113 (7 U.S.C. § 2543) is amended by striking 'section: *Provided, That*' and all that follows through the period and inserting 'section.'." Pet. Br. 42.

On October 6, 1994, the President signed into law the Plant Variety Protection Act Amendments of 1994, Pub. L. No. 103-349, 108 Stat. 3136 ("the 1994 Amendments"). Section 10 of the 1994 Amendments prospectively amends 7 U.S.C. § 2543, the statutory provision in this case, in the exact manner explained above. By striking that proviso from section 2543, the 1994 Amendments eliminate the statutory basis under which farmers can sell PVPA-protected seed to other farmers for reproductive purposes without authority from the certificate owner.

The 1994 Amendments do not affect any existing PVPA certificates, including the two Asgrow soybean varieties at issue here. Section 14(a) of the 1994 Amendments states:

Except as provided in this section, any variety for which a certificate of plant variety protection has been issued prior to the effective date of this Act, and any variety for which an application is pending on

<sup>1</sup> The International Convention for the Protection of New Varieties of Plants, Mar. 19, 1991 is known by the French acronym "UPOV." Article 14(1) of the 1991 UPOV requires that there be authorization of the owner before the seed of a protected plant variety may be offered for sale.

the effective date of this Act, shall continue to be governed by the Plant Variety Protection Act, (7 U.S.C. § 2321 et seq.), as in effect on the day before the effective date of this Act.

In addition, section 15 provides that "[t]his Act and the amendments made by this Act shall become effective 180 days after the enactment of this Act." Thus, the 1994 Amendments are prospective only with respect to the issues presented by this case and do not render the present case moot or insignificant.

The pendency of the bills leading to the recently-enacted legislation was fully discussed in the Government's amicus curiae brief filed in support of Asgrow's petition prior to this Court's grant of certiorari. At that time, the United States recognized that the prospective nature of the bills that later resulted in the 1994 Amendments did not undermine the need for review by this Court of the issues presented by this case. See Brief of United States as Amicus Curiae [petition stage], at 18 ("even if the bills are enacted in their present form, further review of the decision below would be warranted").

In practical effect, Congress has created *two* applicable versions of the PVPA, at least until the expiration of the 18-year term of all PVPA certificates that are pending on or issued before April 4, 1995, *i.e.*, 180 days after the enactment of the 1994 Amendments. It is estimated that there are approximately 3500 issued PVPA certificates that remain subject to the present version of the Act. Pet. Br. 44 & n.32. Those issued certificates include the leading soybean, cotton, wheat, and other PVPA-protected varieties currently being marketed and planted throughout the country. Thus, the legal issues presented by this case remain of critical importance to American agriculture and the private seed breeding industry. See Brief of United States as Amicus Curiae [petition stage], at 19 ("decision below will have a continuing adverse impact on the breeders of novel varieties for years to come").



This case is scheduled for oral argument on Monday, November 7, 1994. Because copies of the official printed version of the 1994 Amendments as signed by the President are not yet available from the Government, 40 copies of the 1994 Amendments as reported in the WESTLAW™ computer data base have been transmitted with this brief in accordance with instructions received from the Office of the Clerk of the Court.

Respectfully submitted,

*Of Counsel:*

BRUCE STEIN  
THE UPJOHN COMPANY  
7000 Portage Road  
Kalamazoo, Michigan 49001  
(616) 323-4000  
  
LAWRENCE C. MAXWELL  
MARY ELLEN MORRIS  
TRABUE, STURDIVANT & DEWITT  
511 Union Street  
Nashville, Tennessee 37219  
(615) 244-9270

RICHARD L. STANLEY  
*Counsel of Record*  
JOHN F. LYNCH  
ARNOLD, WHITE & DURKEE  
750 Bering Drive  
Suite 400 —  
Houston, Texas 77057  
(713) 787-1400  
*Counsel for Petitioner*  
*Asgrow Seed Company*

JUL 23 1993

No. 92-2038

---

---

**Supreme Court of the United States**

OCTOBER TERM, 1993

---

**ASGROW SEED COMPANY,**

*Petitioner,*

**v.**

**DENNY WINTERBOER and BECKY WINTERBOER,  
D/B/A DEEBEES,**

*Respondents.*

---

**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit**

---

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF OF AMICUS CURIAE  
INTELLECTUAL PROPERTY OWNERS  
IN SUPPORT OF THE PETITIONER**

---

ROGER S. SMITH  
HERBERT C. WAMSLEY \*  
INTELLECTUAL PROPERTY OWNERS  
1255 Twenty-Third Street, N.W.  
Suite 850  
Washington, D.C. 20037  
(202) 466-2396  
*Attorneys for Amicus Curiae*

July 23, 1993

\* Counsel of Record



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

---

No. 92-2038

---

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
D/B/A DEEBEES,  
*Respondents.*

---

**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit**

---

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
OF INTELLECTUAL PROPERTY OWNERS  
IN SUPPORT OF THE PETITIONER**

---

Intellectual Property Owners (IPO) moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari. The respondent has refused consent.

IPO is a broadly-based association with members in nearly all major industries. IPO believes the information and views presented in IPO's proposed brief would be useful to the Court as a supplement to the petition for certiorari. Although in agreement with the petitioner's analysis, IPO's proposed brief makes additional arguments. These include: (1) the Court of Appeals interpretation is inconsistent with traditional notions of exclusive rights in U.S. patent, copyright, and trademark law, (2) the

ruling of the Court of Appeals is inconsistent with the International Convention for the Protection of New Varieties of Plants, and (3) the ruling of the Court of Appeals may impede implementation of the North American Free Trade Agreement.

IPO believes its proposed brief would assist this Court in understanding how the case affects the U.S. economy and U.S. and international intellectual property protection.

Respectfully submitted,

ROGER S. SMITH  
HERBERT C. WAMSLEY \*  
INTELLECTUAL PROPERTY OWNERS  
1255 Twenty-Third Street, N.W.  
Suite 850  
Washington, D.C. 20037  
(202) 466-2396  
*Attorneys for Amicus Curiae*  
\* Counsel of Record

July 23, 1993

## QUESTIONS PRESENTED

*Amicus curiae*, Intellectual Property Owners (IPO), adopts the questions presented by petitioner Asgrow Seed Company. The questions presented are:

“(1) Whether the Federal Circuit erred as a matter of law in holding that 7 U.S.C. § 2543 permits up to half of a farmer’s crop produced from a protected novel plant variety to be sold as seed in competition with the owner of the novel variety?”

“(2) Whether the seed sales authorized by 7 U.S.C. § 2543 remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the purchaser that the seed being sold is a protected novel variety?”



## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
INTEREST OF THE AMICUS CURIAE .....	1
<b>ARGUMENT</b>	
I. THE COURT OF APPEALS INTERPRETA- TION OF THE RIGHT TO SAVE AND SELL SEED IS INCORRECT .....	3
A. The Court of Appeals Overlooked Parts of Section 2543 .....	3
B. The Court of Appeals Interpretation of Sec- tions 2541 and 2543 Is Implausible .....	6
II. ASGROW'S INTERPRETATION GIVES MEANING TO ALL WORDS IN SECTIONS 2541 AND 2543 AND PRESERVES THE EX- CLUSIVE RIGHTS THAT ARE FUNDAMEN- TAL TO INTELLECTUAL PROPERTY PRO- TECTION .....	8
III. CERTIORARI IS NECESSARY TO REVIEW THE DECISION OF THE COURT OF AP- PEALS BECAUSE OF THE BROAD IMPACT ON THE U.S. ECONOMY AND INTELLEC- TUAL PROPERTY PROTECTION .....	9
A. The Decision Will Adversely Affect National Competitiveness .....	9
B. The Decision Is Inconsistent With the Inter- national Convention for the Protection of New Varieties of Plants .....	9
C. The Decision May Impede Implementation of the North American Free Trade Agreement..	10
CONCLUSION .....	11
<b>ADDENDUM</b>	
Members of the Board of Directors of Intellectual Property Owners .....	1a

## TABLE OF AUTHORITIES

	Page
<i>Constitutional Provisions</i>	
U.S. Const., art. I, § 8, cl. 8 .....	7
<i>Statutes</i>	
7 U.S.C. § 2483 .....	6
7 U.S.C. § 2541 .....	passim
7 U.S.C. § 2541 (3) .....	passim
7 U.S.C. § 2541 (6) .....	7, 11
7 U.S.C. § 2543 .....	passim
15 U.S.C. § 1114 .....	6
17 U.S.C. § 106 .....	6
35 U.S.C. § 154 .....	6
<i>International Agreements</i>	
<i>International Convention for the Protection of New Varieties of Plants</i> , 33 U.S.T. 2703 .....	2, 9, 10
<i>North American Free Trade Agreement</i> , 32 I.L.M. 605 .....	2, 10, 11
<i>Others</i>	
<i>Bicentennial of the United States Patent and Copy- right Laws</i> (Foundation for a Creative America ed., 1991) .....	6
<i>Industrial Property</i> (World Intellectual Property Organization, Geneva, Switz.), Jan. 1993 .....	9
S. 3070, 91st Cong., 1st Sess. (1969) .....	3, 7

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

No. 92-2038

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
D/B/A DEEBEES,  
*Respondents.*

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

BRIEF OF AMICUS CURIAE  
INTELLECTUAL PROPERTY OWNERS  
IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS CURIAE

Intellectual Property Owners (IPO) files this *amicus curiae* brief in support of the petition of Asgrow Seed Company for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit entered December 21, 1992.

IPO is a nonprofit association that promotes understanding of intellectual property rights in the United States. The organization was incorporated in the District of Columbia in 1972. It is exempt from federal income tax under Internal Revenue Code § 501(c)(6). Members include nearly 100 companies and some small busi-



nesses, universities, and independent inventors who own legal rights such as patents, trademarks, copyrights, and trade secrets.

IPO members are responsible for a large portion of the research and development performed in the United States, and file thousands of patent applications a year in the United States and foreign countries to protect their R&D investments in new technology. The Plant Variety Protection Act (PVPA) extends exclusive protection similar to that available under patent law to sexually reproduced plant varieties. IPO members file for protection provided by the PVPA to protect their R&D investments in plant varieties.

IPO's members are interested in maintaining adequate and effective exclusive rights under all intellectual property statutes, including the PVPA. IPO members also are interested in the continued effectiveness of the International Convention for the Protection of New Varieties of Plants and in prompt implementation of the North American Free Trade Agreement (NAFTA). The latter agreement obligates the United States, Canada, and Mexico to provide effective legal protection for plant varieties.

## ARGUMENT

### I. THE COURT OF APPEALS INTERPRETATION OF THE RIGHT TO SAVE AND SELL SEED IS INCORRECT<sup>1</sup>

#### A. The Court of Appeals Overlooked Parts of Section 2543

IPO agrees with petitioner's analysis of sections 2541 and 2543. The discussion below highlights errors made by the Court of Appeals in not giving meaning to all of the words of section 2543 that led the court into an incorrect interpretation of sections 2541 and 2543.

*Right to Save Seed v. Crop Exemption.* As revealed by its title, section 2543 covers the "right to save seed" and the "crop exemption." The bill that became the Plant Variety Protection Act originally had separate sections on the right to save seed and the crop exemption.<sup>2</sup> Before

<sup>1</sup> IPO will use the citation form "Pet." and a page number to refer to the petition, and the citation form "Pet. App." and a page number to refer to petitioner's appendix.

<sup>2</sup> Sec. 112. Right to Save Seed.

Except under subsections (3) and (4) of section 111, it shall not infringe any right hereunder for a person to save seed and grow the resulting variety for his own use.

Sec. 114. Crop Exemption.

It shall not be infringement to sell seed grown from the protected variety, obtained (for growing) by authority of the proprietor or by saving seed under section 112, for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose, and is in channels which are usual for that purpose and in a manner exclusively for that purpose. A purchaser who diverts such seed from those channels to growing purposes shall not be entitled to any benefit for lack of notice under section 127.

S. 3070, 91st Cong., 1st Sess. (1969). Section 2543 resembles S. 3070 more closely than it resembles the House bill quoted at Pet. 20-21, because section 114 of S. 3070 contained a sentence that corresponds to the last sentence of section 2543.

enactment, the sections were edited and combined into section 2543, with a proviso added at the end of the first sentence to permit sales of limited quantities of saved seed. This was the framework:

Portions of Sections 2543	Subject Matter
First sentence up to the proviso <sup>3</sup>	Right to Save Seed, which limits "such saved seed" to the amount used to produce a crop on the farm
First sentence's proviso <sup>4</sup>	Adds a right to sell "such saved seed" for reproductive purposes in specified circumstances
Second and third sentences <sup>5</sup>	Crop Exemption, which is the right to sell a crop for non-reproductive purposes

In attempting to understand section 2543 and the relationship to section 2541, it helps to maintain the distinc-

<sup>3</sup> "Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section."

<sup>4</sup> "Provided, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable."

<sup>5</sup> "A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement."

tion between the right to save seed and the crop exemption. When the Court of Appeals attached significance to the term "crop exemption,"<sup>6</sup> that court overlooked the fact that Congress used the term to describe only the second and third sentences.

*Relationship of sections 2543 and 2541(3).* Petitioner's interpretation of the first sentence of section 2543 and paragraph (3) of section 2541 is the only interpretation that gives meaning to all words in those passages.<sup>7</sup> The Court of Appeals did not understand that the proviso creates an exemption from section 2541(3) for the right to sell "such saved seed." The court said section 2543 contains "two explicit references" clarifying that farmers who save seed are subject to section 2541(3).<sup>8</sup> The court overlooked "without regard to the provisions of" in the proviso.<sup>9</sup>

It may have been the failure of the Court of Appeals to give any meaning to "without regard to the provisions of" that led the court to attempt to reconcile sections 2541(3) and 2543 by giving an unsupported, extraordinary definition to the term "marketing" in section 2541(3).

*Right of Purchasers of Brown Bag Seed to Save Seed.* The Court of Appeals also overlooked a crucial phrase

<sup>6</sup> Pet. App. 8a. Petitioner explains the court's error at Pet. 8, n.7.

<sup>7</sup> For petitioner's explanation of the relationship of the sections, see particularly the second and third paragraphs at Pet. 19.

<sup>8</sup> Pet. App. 12a.

<sup>9</sup> Section 112 in the original Senate bill contained a right to save seed only for the farmer's own use. Farmers saving seed and planting it on their own farms would not run afoul of section 2541(3), so section 112 defined the right to save seed by making it apply only to activity not coming under section 2541(3). When the proviso was added giving farmers a right to sell "such saved seed," it was necessary to exempt selling of limited quantities of seed defined by the term "such saved seed" from section 2541(3).



in the first sentence of section 2543 when it concluded that "a farmer who purchases PVPA seed from another farmer cannot save any seed from the crop grown with brown bag seed."<sup>10</sup> The sentence states that a person can save seed "produced by him from seed . . . descended from seed obtained . . . by authority of the owner . . . ." Because the Court of Appeals believed that parties who purchased brown bag seed from other parties would be unable to save seed, the court may have believed its interpretation of the remainder of section 2543 did not eviscerate the rights of plant variety owners.

If so, the court was wrong on both counts. All farmers have the right to sell "such saved seed" in accordance with section 2543, regardless of whether their seed is obtained from or descended from seed obtained from the certificate owner. All such farmers are restricted, however, to selling no more than the amount of protected seed needed to produce crops on their own farms.

#### **B. The Court of Appeals Interpretation of Sections 2541 and 2543 Is Implausible**

The Court of Appeals ruling permits up to half of a farmer's crop produced from a protected novel plant variety to be sold as seed in competition with the owner of the novel variety. Such an inroad into the exclusive rights of an intellectual property owner is unprecedented in the history of patent, trademark, and copyright law in the United States, which dates back more than 200 years.<sup>11</sup>

<sup>10</sup> Pet. App. 6a.

<sup>11</sup> See, e.g., 35 U.S.C. § 154 (1988) (right of patent owners to exclude others from making, using, or selling inventions); 17 U.S.C. § 106 (1988) (exclusive rights of copyright owners in copyrighted works); 15 U.S.C. § 1114 (1988) (liability for unauthorized use of registered trademarks); compare 7 U.S.C. § 2483 (1988) (right of plant breeders "to exclude others"); see generally *Bicentennial of the United States Patent and Copyright Laws* (Foundation for a Creative America ed., 1991).

Indeed the patent/copyright clause of the Constitution<sup>12</sup> states the principle of exclusive rights for innovators.

Permitting up to half of a crop to be sold as seed is little different than permitting the purchaser of a patented computer or copyrighted video cassette to make and sell unauthorized copies. The principle is similar whether the reproduction is of protected plant varieties, patented computers, or copyrighted video cassettes. Patent and copyright laws do not permit purchasers to make even replacement copies. It is implausible that Congress would have so eviscerated the right to exclude in the PVPA without explanation. Congress did not intend for farmers to save and sell more seed than needed to produce a crop on the farm.

The ruling that sales of saved seed are not subject to the notice requirement of section 2541(6) also is implausible. Patent, copyright, and trademark laws contain no exemption from notice requirements that resembles the exemption found in the PVPA by the Court of Appeals.

The act of "dispensing" a variety "without notice as to being a protected variety" is an act other than the act of selling "such saved seed" that is given a limited exemption from infringement in section 2543. The last sentence of section 114 of the Senate bill, which became the third sentence of section 2543, imputes notice to a purchaser who improperly diverts to reproductive purposes seed that is sold in the usual channels for nonreproductive purposes. Surely Congress would not have bothered to include this imputed notice section to cover sales of a protected variety not intended to be used as seed, if at the same time Congress was exempting sales of "such saved seed" from the notice requirement without explicitly saying so.

<sup>12</sup> Art. I, § 8, cl. 8, "The Congress shall have power . . . To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

If brown bag sellers are permitted to sell up to half of their crop for seed without giving notice to their customers that the seed is a protected variety, the system of protecting plant varieties will disintegrate. The market for the plant variety owner will be destroyed by purchasers of brown bag seed who can sell large quantities of seed themselves because they are not on notice. It should be presumed that Congress intended a workable system for putting potential infringers on notice of their potential liability for unauthorized activity.

**II. ASGROW'S INTERPRETATION GIVES MEANING TO ALL WORDS IN SECTIONS 2541 AND 2543 AND PRESERVES THE EXCLUSIVE RIGHTS THAT ARE FUNDAMENTAL TO INTELLECTUAL PROPERTY PROTECTION**

The petitioner's interpretation is compatible with the framework of section 2543 and gives meaning to all words in sections 2541(3) and 2543. When meaning is given to the cross reference to section 2541(3) in the introductory clause of section 2543, the portion of section 2543 up to the proviso limits the amount of "such saved seed" that is the subject of the proviso. The proviso then sets forth rules for selling "such saved seed" for reproductive purposes. The second sentence contains the rules for selling the novel variety for other than reproductive purposes.

The proviso refers to selling "such saved seed," which is the term used earlier in the section to describe seed needed for use on the farm in the production of a crop, and which is as much seed as can ever be sold under section 2543 without infringing under section 2541(3). Section 2543 permits a farmer to avoid waste by selling "such saved seed," and it preserves the right to exclude competitors that is the cornerstone for all forms of intellectual property protection.

**III. CERTIORARI IS NECESSARY TO REVIEW THE DECISION OF THE COURT OF APPEALS BECAUSE OF THE BROAD IMPACT ON THE U.S. ECONOMY AND ON INTELLECTUAL PROPERTY PROTECTION**

**A. The Decision Will Adversely Affect National Competitiveness**

A research-based seed industry provides the same benefits to the national economy that are provided by any research-based industry protected by intellectual property rights—jobs, increased exports, and an improved standard of living. The briefs of petitioner and the American Seed Trade Association explain the effects on the seed industry. The Court of Appeals acknowledged that its ruling "could undercut much of the PVPA's incentives."<sup>13</sup> Such incentives are essential to continued seed research. The statute can and should be interpreted so that its incentives are not undercut.

**B. The Decision Is Inconsistent With the International Convention for the Protection of New Varieties of Plants**

The United States and 20 other countries<sup>14</sup> are members of the International Convention for the Protection of New Varieties of Plants (UPOV Convention), as revised at Geneva, on October 23, 1978.<sup>15</sup> Article 5 of the UPOV Convention requires member countries to provide minimum rights to plant breeders. Article 5(1) provides:

The effect of the right granted to the breeder is that his prior authorisation shall be required for

<sup>13</sup> Pet. App. 12a.

<sup>14</sup> *Industrial Property* (World Intellectual Property Organization, Geneva, Switz.), Jan. 1993, at 19.

<sup>15</sup> 33 U.S.T. 2703. The convention is commonly identified by UPOV, which is the French acronym for the union that administers the convention: Union Internationale Pour La Protection Des Obtentions Végétales.



- the production for purposes of commercial marketing
- the offering for sale
- the marketing

of the reproductive or vegetative propagating material, as such, of the variety . . . .

Article 5(4) says that any member state may, under its law, grant breeders "a more extensive right than that set out in paragraph (1) . . . ." The UPOV Convention gives no indication that member states are free to grant *less* extensive rights than required by paragraph (1). The United States joined the UPOV Convention by executive agreement on the assumption that the Plant Variety Protection Act was consistent with the UPOV Convention. The ruling of the Court of Appeals, allowing competitors to produce, offer for sale, or market up to half of a crop without the breeder's authorization, creates a significant conflict with article 5(1). A court interpreting a statute that is the basis for United States adherence to an international agreement should seek to preserve the agreement.

#### C. The Decision May Impede Implementation of the North American Free Trade Agreement

Article 1701 of the North American Free Trade Agreement,<sup>16</sup> signed by the President of the United States, requires the United States, Canada, and Mexico to "give effect to . . . the substantive provisions of . . . the International Convention for the Protection of New Varieties of Plants, 1978 (UPOV Convention) . . ." Article 1709 states that "each party shall provide for the protection of plant varieties through patents, an effective scheme of *sui generis* protection, or both."

Although NAFTA is not yet ratified, United States officials are proceeding on the assumption that U.S. plant

<sup>16</sup> 32 I.L.M. 605 (signed Dec. 17, 1992).

variety protection complies with the agreement. If the Court of Appeals decision requires additional legislation to restore the intended protection for plant varieties in this country, NAFTA implementation may be complicated or the U.S. seed industry may encounter delay in obtaining protection abroad.

#### CONCLUSION

The decision of the Court of Appeals will have a devastating effect on plant variety protection for innovative seed companies. A grant of certiorari is requested to review the Court of Appeals analysis of sections 2543 and 2541(6) on this vital issue of national importance.

Respectfully submitted,

ROGER S. SMITH  
HERBERT C. WAMSLEY \*  
INTELLECTUAL PROPERTY OWNERS  
1255 Twenty-Third Street, N.W.  
Suite 850  
Washington, D.C. 20037  
(202) 466-2396  
*Attorneys for Amicus Curiae*  
\* Counsel of Record

July 23, 1993

## **ADDENDUM**



## ADDENDUM

MEMBERS OF BOARD OF DIRECTORS OF  
INTELLECTUAL PROPERTY OWNERS

Robert L. Andersen FMC Corporation Philadelphia, PA	Robert P. Hayter Otis Elevator/United Technologies Corp. Farmington, CT
Robert A. Armitage * Upjohn Company Kalamazoo, MI	Edward P. Heller, III Seagate Technologies Scotts Valley, CA
Joseph H. Ballway, Jr. Amoco Corporation Chicago, IL	Wayne C. Jaeschke Henkel Corporation Plymouth Meeting, PA
Norman L. Balmer Union Carbide Corporation Danbury, CT	John J. Klocko, III E.I. DuPont de Nemours & Co. Wilmington, DE
Erwin F. Berrier, Jr. General Electric Company Fairfield, CT	Paul J. Koivuniemi Synergen, Inc. Boulder, CO
Ronald Bleeker Allied Signal, Inc. Morristown, NJ	William E. Lambert, III Rohm & Haas Company Philadelphia, PA
W. Dexter Brooks Coca-Cola Company Atlanta, GA	Edward T. Lentz SmithKline Beecham Corporation Philadelphia, PA
James L. Ferguson Optical Shields, Inc. Menlo Park, CA	William F. Marsh Air Products & Chemicals, Inc. Allentown, PA
Michael W. Glynn Ciba Hawthorne, NY	John F. McDonnell AT&T Basking Ridge, NJ
Gary L. Griswold 3M St. Paul, MN	

\* Mr. Armitage did not participate in preparation of this brief or vote on whether to file it.

Alexander McKillop  
Mobil Oil Corporation  
Reston, VA

Ronald E. Myrick  
Digital Equipment  
Corporation  
Maynard, MA

Alphonse R. Noe  
American Cyanamid  
Company  
Stamford, CT

Garro A. Partoyan  
Mars, Incorporated  
McLean, VA

Ralph D. Pinto  
University of Virginia  
Charlottesville, VA

Jacobus C. Rasser  
Procter & Gamble  
Cincinnati, OH

Allen W. Richmond  
Philips Petroleum Company  
Bartlesville, OK

Melvin J. Scolnick  
Pitney Bowes Inc.  
Stamford, CT

Howard C. Stanley  
Monsanto  
St. Louis, MO

Roger S. Smith  
IBM Corporation  
Purchase, NY  
Herbert C. Wamsley  
Intellectual Property Owners  
Washington, DC

Richard G. Waterman  
The Dow Chemical Company  
Midland, MI

John K. Williamson  
Westinghouse Electric  
Corporation  
Pittsburgh, PA

Richard C. Witte  
Cincinnati, OH



JUL 23 1993

No. 92-2038

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

ASGROW SEED COMPANY,

*Petitioner,*

v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,

*Respondents.*

---

On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Federal Circuit

---

MOTION AND BRIEF OF AMICUS CURIAE  
AMERICAN INTELLECTUAL PROPERTY LAW  
ASSOCIATION IN SUPPORT OF PETITIONER

\*WILLIAM L. LAFUZE  
*President, AMERICAN INTELLECTUAL  
PROPERTY LAW ASSOCIATION*  
2001 Jefferson Davis Highway  
Arlington, Virginia 22202  
(703) 415-0780

*Counsel for Amicus Curiae*

*Of Counsel:*

DONALD R. DUNNER  
J. MICHAEL JAKES  
FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER  
1300 I Street, N.W.  
Washington, D.C. 20005  
(202) 408-4000

*\*Counsel of Record*

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

---

No. 92-2038

---

ASGROW SEED COMPANY,

*Petitioner,*

v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,

*Respondents.*

---

**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Federal Circuit**

---

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
OF AMERICAN INTELLECTUAL PROPERTY LAW  
ASSOCIATION IN SUPPORT OF PETITIONER**

---

Pursuant to Rule 37 of this Court, the American Intellectual Property Law Association (AIPLA) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petition for certiorari. Respondents have refused consent for AIPLA to file the brief.

AIPLA is a national association whose members are primarily intellectual property attorneys. As such, AIPLA is concerned with the proper interpretation

of important Federal statutes, such as the Plant Variety Protection Act (PVPA), which protect various forms of intellectual property.

AIPLA believes that its views will be helpful to the Court in understanding the impact of the decision below on the PVPA, and in particular, how that decision has totally upset the balance created by Congress between encouraging innovation in the seed industry and addressing the needs of farmers who use protected seed varieties.

Respectfully submitted,

---

\*WILLIAM L. LAFUZE  
*President, AMERICAN INTELLECTUAL  
 PROPERTY LAW ASSOCIATION*  
 2001 Jefferson Davis Highway  
 Arlington, Virginia 22202  
 (703) 415-0780

*Counsel for Amicus Curiae*

*Of Counsel:*

DONALD R. DUNNER  
 J. MICHAEL JAKES  
 FINNEGAN, HENDERSON, FARABOW,  
 GARRETT & DUNNER  
 1300 I Street, N.W.  
 Washington, D.C. 20005  
 (202) 408-4000

*\*Counsel of Record*

## QUESTION PRESENTED

*Amicus curiae*, American Intellectual Property Law Association, adopts the following question presented by petitioner Asgrow Seed Company:

Whether the Federal Circuit erred as a matter of law in holding that 7 U.S.C. § 2543 [of the Plant Variety Protection Act] permits up to half of a farmer's crop produced from a novel plant variety to be sold as seed in competition with the owner of the novel variety?



## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	iii
STATEMENT OF INTEREST .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
I. THE PURPOSE OF THE PLANT VARIETY PROTECTION ACT IS TO PROMOTE INNO- VATION IN AMERICAN AGRICULTURE .....	3
II. THE FEDERAL CIRCUIT'S BROAD INTER- PRETATION OF THE "FARMER'S EXEMP- TION" NULLIFIES THE ACT AS AN INCENTIVE FOR INNOVATION .....	5
III. THE FEDERAL CIRCUIT'S DECISION IN- VOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RE- VIEWED BY THIS COURT .....	8
CONCLUSION .....	10

## TABLE OF AUTHORITIES

CASES:	Page
<i>Cornelius v. Nutt</i> , 472 U.S. 648 (1985) .....	9
<i>Delta &amp; Pine Land Co. v. Peoples Gin Co.</i> , 694 F.2d 1012 (5th Cir. 1983) .....	5,6,8
<i>Eli Lilly &amp; Co. v. Medtronic, Inc.</i> , 496 U.S. 661 (1990) .....	9
STATUTES:	
7 U.S.C. §§ 2321-2582 .....	3
7 U.S.C. §§ 2482-83 .....	3
7 U.S.C. § 2483(a) .....	4
7 U.S.C. § 2541(3) .....	4
7 U.S.C. § 2543 .....	<i>passim</i>
7 U.S.C. § 2581 .....	3
28 U.S.C. § 1295(a)(1) .....	8-9
28 U.S.C. § 1338 .....	8-9
OTHER AUTHORITIES:	
H.R. Rep. No. 1605, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 5082 .....	3
H.R. Rep. No. 312, 97th Cong., 1st Sess. (1981) .	9

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

---

**No. 92-2038**

---

ASGROW SEED COMPANY,

*Petitioner,*

v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,

*Respondents.*

---

**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Federal Circuit**

---

**BRIEF OF AMICUS CURIAE  
AMERICAN INTELLECTUAL PROPERTY LAW  
ASSOCIATION IN SUPPORT OF PETITIONER**

---

**STATEMENT OF INTEREST**

The American Intellectual Property Law Association (AIPLA) is a national association of more than 8,000 members, primarily attorneys, whose interest and practice lie in the areas of patent, copyright, trademark, trade secret, and other intellectual property law. AIPLA's members are employed by private law firms, corporations, universities, and government. AIPLA has no interest in either of the parties.

AIPLA is concerned with the balance between the encouragement of innovation and the freedom of the public to reap the benefits of such innovations. The Federal Circuit's decision in this case is troubling because it serves to *discourage* innovation in the seed industry, thus upsetting this balance. Indeed, as recognized by Circuit Judge Newman, "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. C, p. 30a.

AIPLA believes that this case is of national importance because of its potentially devastating effect on innovation in the United States seed industry, and consequently the continued development and global competitiveness of American agriculture, directly contrary to Congress' clearly stated intent. Therefore, AIPLA urges that this Court grant the petition for writ of certiorari.

#### SUMMARY OF ARGUMENT

This case involves a question of statutory interpretation of the Plant Variety Protection Act (PVPA), which Congress enacted to provide legal protection for the developers of novel seed varieties. The Federal Circuit interpreted 7 U.S.C. § 2543 of the PVPA, which allows a farmer to save seed and, in limited circumstances, to sell "such saved seed," as permitting up to *half* of a farmer's entire crop to be sold as seed. This decision not only is at odds with the legislative history and the statutory language of the PVPA, it frustrates the purpose of the PVPA by allowing farmers to sell novel seed varieties in direct competition with the seed developers. By authorizing this practice, the Federal Circuit's decision substan-

tially erodes the protection for novel seed varieties that Congress intended to provide in enacting the PVPA. As a result, the seed industry's incentive to make significant investments in research and development of new seeds will be severely diminished. Ultimately, it is the national interest that will suffer by not having the greater quality and variety of agricultural products on the market that the PVPA was enacted to ensure. This case is therefore of national importance, and merits a grant of certiorari from this Court.

#### ARGUMENT

##### I. THE PURPOSE OF THE PLANT VARIETY PROTECTION ACT IS TO PROMOTE INNOVATION IN AMERICAN AGRICULTURE

The Plant Variety Protection Act (PVPA), 7 U.S.C. §§ 2321-2582, enacted by Congress in 1970, provides patent-like protection for novel varieties of sexually reproduced seed, transplants, and plants. Congress' aim in enacting the PVPA was to increase the competitiveness of American agricultural products in world markets and, ultimately, to result in superior products more resistant to disease and higher in overall yield and quality. This purpose is reflected in the legislative history, *see* H.R. Rep. No. 1605, 91st Cong., 2d Sess. 1-3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5082, 5082-83, as well as the language of the statute itself. 7 U.S.C. § 2581.

To achieve this purpose, the PVPA provides limited exclusive rights for a term of 18 years to breeders of novel plant varieties who obtain a Certificate of Plant Variety Protection from the Plant Variety Protection Office. 7 U.S.C. §§ 2482-83. This Certificate



grants the breeder the right "to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing . . . a hybrid or different variety therefrom." 7 U.S.C. § 2483(a). Through its grant of exclusive rights, the PVPA provides incentives for seed companies to increase their research and development of novel seed varieties, and thus achieve the purposes of the Act.

In enacting the PVPA, Congress expressly balanced the plant breeder's exclusive rights with the practical needs of farmers who would use the protected seed varieties. Under the Act, a farmer could, of course, sell seed produced from a protected seed variety for "other than reproductive purposes," such as food or animal feed. 7 U.S.C. § 2543. In addition, farmers were allowed to continue their usual practice of saving part of their crop as seed for replanting on their farms. To qualify for this exemption, however, the seed must not have been grown "as a step in marketing (for growing purposes)" the seed. *Id.*; 7 U.S.C. § 2541(3). Thus, the first sentence of § 2543 provides:

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm or for sale as provided in this section . . . .

Section 2543 also permits a farmer who does not use the saved seed himself to sell it to another farmer, provided that neither farmer is in the seed business:

[I]t shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

*Id.*

## II. THE FEDERAL CIRCUIT'S BROAD INTERPRETATION OF THE "FARMER'S EXEMPTION" NULLIFIES THE ACT AS AN INCENTIVE FOR INNOVATION

The dilemma inherent in this case is how to interpret the scope of the exemption in § 2543 while still retaining Congress' aim in enacting the PVPA of encouraging innovation in the seed industry. In one early PVPA case, brought before the advent of the Federal Circuit, the Fifth Circuit expressly recognized that the "farmer's exemption" in § 2543 is somewhat at odds with the primary purpose of the PVPA:

While the main body of the Act assures developers of novel varieties of the exclusive right to sell and reproduce that variety, the crop exemption dilutes that exclusivity by allowing individual farmers to sell the protected variety without liability. The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains.

*Delta & Pine Land Co. v. Peoples Gin Co.*, 694 F.2d 1012, 1016 (5th Cir. 1983). Thus, the court concluded

that a narrower interpretation of the exemption was "more in keeping with Congress' primary objective." *Id.* The court further elaborated that a more narrow reading of the exemption in § 2543 "creates the greatest amount of internal harmony in the overall statutory scheme." *Id.*

Instead of reading the exemption narrowly in keeping with Congress' objective, the Federal Circuit in *Asgrow Seed* interpreted § 2543 as permitting *up to half of a farmer's entire crop to be sold as seed*. By this interpretation, the Federal Circuit has totally upset the balance created by Congress between encouraging innovation in the seed industry and addressing the needs of farmers. "Although it may appear that the broadest reading of the exemption would benefit farmers today, it could be detrimental to their interests tomorrow." *Delta & Pine Land Co.*, 694 F.2d at 1016.

Specifically, the Federal Circuit in *Asgrow Seed* held that § 2543 does not limit the amount of seed a farmer can save, Pet. App. A, at pp. 6a, 10a-11a, and that the only quantitative limit on sales of protected seed varieties is that the seller and buyer must be persons whose "primary occupation is the growing of crops for sale other than reproductive purposes." Pet. App. A, at pp. 7a-8a. Thus, under the court's reasoning, the only limit on the amount of seed sales permitted under § 2543 is that a farmer must grow more crops from the protected seed variety for sale to consumers than for sale to other farmers for planting. Pet. App. A, at p. 8a. The court further held that this "primary farming" determination must be made on a "crop-by-crop" basis with respect to each novel variety protected under the Act. *Id.*

The Federal Circuit's decision reaches a result that is totally contrary to Congress' intent in enacting the PVPA. It essentially allows farmers to, themselves, sell large quantities of novel seed varieties, thus entering into competition with the seed developers. By allowing up to half of a farmer's crop to be sold as seed, the Federal Circuit authorizes this practice. Surely, allowing farmers to enter into competition with the seed developers is not the result that Congress intended in enacting the PVPA. As the district court's opinion in this case points out, allowing farmers to sell virtually unlimited amounts of seed developers' novel seed strains would frustrate the intent of the PVPA. Pet. App. B, p. 23a. The more that farmers are allowed to compete with the seed developers, the less likely it is that there will be innovation in the field. The national interests in having new and improved plants on the market will inevitably suffer as a result of the Federal Circuit's ruling.

Moreover, the Federal Circuit's interpretation of the statute is neither required nor supported by the statutory language. A more logical reading of the statute, in keeping with the Act's purpose, is that the first sentence of § 2543 limits the amount of saved seed subject to being sold to the amount needed to produce another crop on the farmer's own farm. As Judge Newman explained in her dissent, § 2543 was designed to "permit continuation of the historical practice of farmers to save seed for their own use, with occasional minor transactions with neighbors on this saved seed." Pet. App. C, pp. 37a-38a (emphasis added). Such an interpretation of the statute is consistent with the statutory language, the express intent of Congress, and the stated purpose of the PVPA.



### III. THE FEDERAL CIRCUIT'S DECISION INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT

The PVPA is critically important to the private seed industry's research activities in developing novel seed varieties and bringing them to the public. Without some form of legal protection against the sale of protected seed, developers of novel seed varieties will not be able to recoup their extensive research and development costs. By allowing up to half of a farmer's entire crop to be sold as seed, however, the Federal Circuit's decision substantially erodes the protection of the PVPA and serves to discourage innovation in the seed industry. The seed industry will, undoubtedly, be devastated by the Federal Circuit's decision in this case. The purpose of Congress in enacting the PVPA was to invigorate the seed industry, not to cripple it.

Moreover, such a disincentive to the seed industry creates a chain effect: the less time the seed companies spend on research and development, the smaller the chance of discovering superior varieties of seed. The smaller the chance of discovering novel seed varieties, the less chance consumers have to reap the benefits of such potentially superior products. See *Delta & Pine Land Co.*, 694 F.2d at 1016 (tracing long-term effects of giving broad construction to PVPA exemption). Therefore, it is clear that the effect of the Federal Circuit's decision in this case spreads well beyond the private seed industry.

This case further underscores the importance of the supervisory role of the Supreme Court over the Federal Circuit. Because the Federal Circuit has exclusive jurisdiction over appeals involving the PVPA, 28

U.S.C. §§ 1295(a)(1), 1338, there will not be a split among the circuits on this issue. Now that the Federal Circuit has fixed the rule on the interpretation of the farmer's exemption in § 2543 of the PVPA, there is no chance for further development in the law on this issue.

Congress intended this Court to review decisions of the Federal Circuit where circumstances warrant. See *Cornelius v. Nutt*, 472 U.S. 648, 657 (1985); H.R. Rep. No. 312, 97th Cong., 1st Sess. 18-19 (1981). This Court has previously granted certiorari in similar circumstances involving interpretation of a Federal statute within the exclusive jurisdiction of the Federal Circuit, where an important public policy involving the balance between encouraging innovations and the right to use those innovations was at issue. See *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990) (interpreting statutory exemption from patent infringement in 35 U.S.C. § 271(e)(1)).

AIPLA submits that the circumstances warrant review in this case. The Federal Circuit's decision, if left unchecked, will have a potentially devastating effect on innovation in the seed industry, and consequently, the competitiveness of American agriculture. Ultimately, it is the national interest that will suffer from decreased innovation in the seed industry, which will result from this greatly decreased legal protection for novel seed varieties. This Court should not allow a panel decision of a Court of Appeals, which was denied *in banc* consideration by a single vote, to frustrate the entire purpose of an important federal statute without further review at the highest level.



## CONCLUSION

For these reasons, the American Intellectual Property Law Association as *amicus curiae* urges that this Court grant the petition for writ of certiorari.

Respectfully submitted,

\*WILLIAM L. LAFUZE  
*President, AMERICAN INTELLECTUAL  
PROPERTY LAW ASSOCIATION*  
2001 Jefferson Davis Highway  
Arlington, Virginia 22202  
(703) 415-0780

*Counsel for Amicus Curiae*

*Of Counsel:*

DONALD R. DUNNER  
J. MICHAEL JAKES  
FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER  
1300 I Street, N.W.  
Washington, D.C. 20005  
(202) 408-4000

*\*Counsel of Record*

MOTION FILED

JUL 22 1993

No. 92-2038

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

ASGROW SEED COMPANY,  
*Petitioner,*  
v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d b/a DEEBEES,  
*Respondents.*

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF AMICUS CURIAE OF THE  
AMERICAN SEED TRADE ASSOCIATION  
IN SUPPORT OF PETITIONER

GARY JAY KUSHNER \*  
JOHN G. ROBERTS, JR.  
MARK D. DOPP  
HOGAN & HARTSON  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5856

*Counsel for Amicus Curiae*

\* Counsel of Record

*American Seed Trade Association*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

---

No. 92-2038

---

ASGROW SEED COMPANY,  
*Petitioner,*

v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

---

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

---

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

---

The American Seed Trade Association ("ASTA") is a voluntary, nonprofit national trade association representing approximately 560 research intensive companies engaged in the discovery, development, and marketing of new seed varieties. ASTA members annually invest millions of dollars in the research and development of new seed varieties to make American agriculture more productive and efficient. ASTA members also receive and hold the vast majority of plant variety protection certificates issued by the Plant Variety Protection Office of the



United States Department of Agriculture. ASTA members thus incur the greatest losses caused by violations of the Plant Variety Protection Act, and have a direct stake in the correct interpretation of that statute. As representative of the entire seed industry, ASTA is in a unique position to bring to the attention of the Court information on the impact of the Plant Variety Protection Act on that industry, and in particular the deleterious impact industry-wide of the sort of brown bagging abuses permitted by the lower court's erroneous interpretation of the Act.

The Court of Appeals for the Federal Circuit granted ASTA's motion for leave to participate as amicus curiae below, and ASTA filed a brief amicus curiae supporting petitioner Asgrow Seed Company. ASTA's brief was cited by Circuit Judge Newman in her dissent from denial of rehearing in banc. Pet. App. 32a n.2. *See also id.* at 31a (discussing views of amici curiae). Counsel for respondents has nonetheless declined to consent to the filing of this brief. Counsel for petitioner has consented.

Respectfully submitted,

GARY JAY KUSHNER \*  
JOHN G. ROBERTS, JR.  
MARK D. DOPP  
HOGAN & HARTSON  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5856

*Counsel for Amicus Curiae*  
*American Seed Trade Association*

\* Counsel of Record

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
STATEMENT OF INTEREST OF AMICUS CURIAE..	1
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	6
I. THE PVPA GAVE BIRTH TO A NEW ERA FOR THE AMERICAN SEED INDUSTRY BY PROVIDING AN INCENTIVE FOR RE- SEARCH AND DEVELOPMENT .....	6
II. BROWN BAGGING HAS EVISCERATED THE INCENTIVE PROVIDED BY THE PVPA AND LED TO ABANDONMENT OF RESEARCH PROGRAMS .....	9
III. THE ERRONEOUS CONSTRUCTION BY THE FEDERAL CIRCUIT SANCTIONS BROWN BAGGING ABUSES AND NULLI- FIES THE PROTECTION AFFORDED BY THE PVPA .....	14
CONCLUSION .....	17

## TABLE OF AUTHORITIES

Cases	Page
<i>Crandon v. United States</i> , 494 U.S. 152 (1990)....	15
<i>Delta and Pine Land Company v. Peoples Gin Company</i> , 694 F.2d 1012 (5th Cir. 1983) .....	16
<i>Diamond v. Chakrabarty</i> , 447 U.S. 303 (1980)....	7
<i>K Mart Corp. v. Cartier, Inc.</i> , 486 U.S. 281 (1988) .....	15
<i>Peck v. Jenness</i> , 48 U.S. 612 (1849) .....	15
Statutes	
7 U.S.C. §§ 2321-2581 .....	4
7 U.S.C. § 2483(b) .....	8
35 U.S.C. § 161 .....	7
Other	
Economic Research Service, United States Department of Agriculture, <i>Intellectual Property Rights and the Private Seed Industry</i> , Agricultural Economic Report No. 654 (Nov. 1991) ..3, 6, 9, 10	
H.R. Rep. No. 1115, 96th Cong., 2d Sess. (1980) ....	7, 8, 9, 17
H.R. Rep. No. 1605, 91st Cong., 2d Sess. (1970) ....	8, 10
Office of Technology Assessment, <i>New Developments in Biotechnology: Patenting Life</i> , Special Report, OTA-BA-370 (GPO 1989) .....	14
R. Perrin, K. Kunnings, and L. Ihnen, <i>Some Effects of the U.S. Plant Variety Protection Act of 1970</i> , Economics Research Report No. 46, Department of Economics and Business, North Carolina State University (August, 1983) .....	9
S. Rep. No. 1138, 91st Cong., 2d Sess. (1970) .....	8
A. Tallard, ed., <i>A Workshop Report: An Evaluation of the Issues, Challenges, and Opportunities Related to Plant Patenting</i> (Jan. 31-Feb. 3, 1989) .....	9

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

---

No. 92-2038

---

ASGROW SEED COMPANY,  
*Petitioner,*  
 v.

DENNY WINTERBOER and BECKY WINTERBOER,  
 d b a DEEBEES,  
*Respondents.*

---

On Petition for Writ of Certiorari to the  
 United States Court of Appeals  
 for the Federal Circuit

---

BRIEF AMICUS CURIAE OF THE  
 AMERICAN SEED TRADE ASSOCIATION  
 IN SUPPORT OF PETITIONER

---

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Seed Trade Association ("ASTA") is a voluntary, nonprofit national trade association representing approximately 560 research intensive companies engaged in the discovery, development, and marketing of new seed varieties. ASTA members annually invest millions of dollars in the research and development of new seed varieties to make American agriculture more pro-

ductive and efficient. ASTA members also receive and hold the vast majority of plant variety protection certificates issued by the Plant Variety Protection Office of the United States Department of Agriculture. ASTA members thus incur the greatest losses caused by violations of the Plant Variety Protection Act, and have a direct stake in the correct interpretation of that statute. ASTA participated as amicus curiae in this case before the Court of Appeals for the Federal Circuit.

### STATEMENT OF THE CASE

The facts are set forth fully in petitioner's statement of the case, and ASTA will not repeat them here. We note, however, that the facts fit a familiar pattern, increasingly repeated not only in connection with protected soybean varieties but with respect to wheat, cottonseed, and a wide range of other sexually reproduced plants that form the basis of American agriculture. The activity of the Winterboers that led to the present litigation—purchase of seed protected under the Plant Variety Protection Act, growth of a crop with that seed producing many multiples of the original seed purchase, and then sale to other farmers of all or most of the crop as seed in direct competition with the owner of the seed variety, rather than as grain or feed in the market—has become a persistent problem threatening the entire seed industry.

This phenomenon has been confirmed not only by the extensive litigation that has arisen in response to such "brown bagging" abuses,<sup>1</sup> but by the Economic Research

<sup>1</sup> For example, petitioner Asgrow filed at least 18 suits in 1988-1991 to enforce its PVPA certificates for soybeans. See Joint Appendix 30-31, *Asgrow Seed Company v. Winterboer*, 982 F.2d 486 (Fed. Cir. 1992). Delta and Pine Land Company was involved in three suits in 1992 alone in response to brown bagging abuses undermining its rights to cottonseed varieties. See Brief for Amicus Curiae Delta and Pine Land Company Urging Affirmance of the Judgment 18, *Asgrow Seed Company v. Winterboer*, *supra*.

Service of the Department of Agriculture. A recent report by that office confirmed that "significant portions of wheat and soybean varieties have been grown from bin run seed"—i.e., brown bag seed, or seed that was not purchased from the owner of the variety supposedly "protected" under the Plant Variety Protection Act. Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, Agricultural Economic Report No. 654, at 1 (Nov. 1991).

The broader significance of the fact pattern in this case is also confirmed by the extensive participation of amici curiae in the court below. As Judge Newman noted, twelve briefs amici curiae were filed below, "apparently representing the entire seed industry." Pet. App. 31a. See Pet. 7 n.5. Not only ASTA, but a wide variety of individual companies holding certificates under the PVPA came forward to explain the adverse impact of brown bagging abuses on their particular research and development programs. See *infra*, pp. 9-14.

In short, the facts of this case are hardly unique. They are part of a pattern replicated throughout the country and across the full range of sexually reproduced crops. This litigation is accordingly of concern far beyond Asgrow Seed Company and the Winterboers.

### SUMMARY OF ARGUMENT

I. The continued well-being and international competitiveness of American agriculture depends in large measure on the development of new seed varieties that produce greater yields and are more resistant to adverse environmental conditions, disease, and agricultural pests. Prior to 1970, the bulk of research and development in the area of sexually reproduced crops—such as soybeans, wheat, and cotton—was conducted by university experiment stations and government entities. Extensive private commercial investment in new sexually reproduced plant



varieties was not feasible, because farmers could grow and sell many multiples of the new seed variety after the initial purchase, precluding recovery by the private investor of its significant research and development costs.

The Plant Variety Protection Act, 7 U.S.C. §§ 2321-2581, was designed to and did change that. Prompted by the success of similar legislation in England, the Act afforded patent-like protection to new seed varieties, providing the private sector an opportunity to recoup the costs of developing the new varieties. The Act was a great success, giving birth to a new era for the American seed industry. Private funds poured into the development of new seed varieties. Not all of the new varieties were commercially successful, and when one was not, the investor lost money. But there was a dramatic increase in the number of commercially available new varieties offering greater yields and crops more resistant to disease and pestilence. And the protection afforded by the Plant Variety Protection Act offered an incentive to persist in the financially risky endeavor of trying to develop new and better varieties. University extension services and government funding were able to be redirected to more basic research, while the private sector took up the task of developing progressively better seed varieties for the commercial market.

II. With the success of the Act and the boom in the private seed breeding industry, however, a significant abuse of the Act developed. Farmers began selling all or portions of a crop derived from a seed variety protected under the Plant Variety Protection Act for use as seed, cutting into the supposedly protected market of the breeder. The farmer incurred none of the extensive research and development costs of the seed trade company, and accordingly could underprice the company by a wide margin. See Pet. 4 n.2. This practice—known as “brown bagging”—undermined the entire structure of the Act, for it removed the critical financial incentive for private sector investment in the first place.

The national consequences of removing the financial incentive are increasingly evident throughout the seed industry. Companies that had established new research programs and invested millions of dollars after passage of the Plant Variety Protection Act found that, time after time, the promised financial rewards failed to materialize due to brown bagging. This was not because the new seed varieties they developed were unsuccessful—the varieties became predominant in terms of the number of acres planted. The problem was that only a small portion of the seed necessary to plant those acres was purchased from the “protected” certificate holder under the Plant Variety Protection Act. The rest came from brown bagging. With the promised protection of the Act being eaten away by brown bagging abuses, company after company—Anderson Clayton, Cargill, Agrigenetics, Agripro, Jacob Hartz, Northrup King, Pioneer Hi-Bred, Delta and Pine, Golden Harvest, Stoneville Pedigreed, DeKalb, and others—was forced to abandon seed development programs and shut down research facilities.

III. The decision below, by construing the statute to permit farmers to sell as seed up to 50 percent of a crop grown from a protected variety, legitimizes much of the brown bagging that has already occurred and will certainly encourage even more. The end result will plainly be, as Judge Newman pointed out, to “nullif[y] the Plant Variety Protection Act as an incentive for innovation in agriculture.” Pet. App. 30a (dissenting from denial of rehearing in banc). Although the immediate impact will be on the seed industry, the long-term consequences will be borne by farmers themselves, who will have fewer and less beneficial seed varieties to choose from, and by consumers, who will no longer enjoy the benefits of agricultural innovation.

As explained in the petition for certiorari, nothing in the language of the statute requires such a result. Indeed, the language instead compels an interpretation limiting

the amount of protected seed a farmer may sell to the amount saved to grow another crop. Such a construction effectively prevents farmers from going into competition with the owners of seed varieties, while allowing a farmer to engage in the traditional practice of saving enough seed for next year's crop or selling such saved seed to a neighbor if his own planting plans change. Such a construction also serves the underlying purpose of the Plant Variety Protection Act by ensuring that the incentive to develop new and better varieties is not eviscerated by an exception swallowing the rule.

### ARGUMENT

#### I. THE PVPA GAVE BIRTH TO A NEW ERA FOR THE AMERICAN SEED INDUSTRY BY PROVIDING AN INCENTIVE FOR RESEARCH AND DEVELOPMENT

The American seed industry engages in research and development to produce novel seed varieties offering farmers higher yields and crops more resistant to adverse environmental conditions, disease, and pestilence. The need for new and better seed varieties is a continuous one. The prospect of ever-increasing yields prompts ongoing efforts, as does the need to respond continually to evolving disease and insect threats.<sup>2</sup>

Most agricultural crops are reproduced through self or cross pollination. Self pollinated crops include soybeans, wheat, and cotton; cross pollinated crops include corn and sorghum. Prior to enactment of the Plant Variety Protection Act in 1970, the American seed industry devoted the bulk of its resources to cross pollinated crops, which

<sup>2</sup> For example, new rust diseases—a particular threat to wheat crops—appear about every five years. The demand for new varieties resistant to those diseases therefore follows a similar pattern. See Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, *supra*, at 8.

were easily hybridized. The reason was simple: Hybridized crops do not generate seeds that can be replanted or sold to grow another crop with the same characteristics. The developer of a successful hybrid therefore had inherent protection and a market for his product year after year, allowing him the opportunity to recoup the investment necessary to develop the hybrid in the first place. See H.R. Rep. No. 1115, 96th Cong., 2d Sess. 4 (1980).

The Plant Patent Act of 1930 reinforced this inherent protection, authorizing the developer of a new variety of an asexually reproduced plant to obtain a patent for the new variety. 35 U.S.C. § 161. The Plant Patent Act, however, was specifically limited to asexually reproduced plants. See *Diamond v. Chakrabarty*, 447 U.S. 303, 311-313 (1980).

The developer of a novel variety had no protection with respect to sexually reproduced plants. Once the new seed was sold, any farmer could grow a crop with it, generating many times the number of seeds originally purchased. See Pet. 3 (one bushel of soybean seeds produces 45 bushels of the same seeds). Because he did not incur the extensive research and development costs necessary to produce the novel variety, the farmer could sell the second-generation seed in competition with the developer at a much lower price. See Pet. 4 n.2 (Winterboers sold Asgrow's protected variety for eight dollars per bushel less than Asgrow).

The research and development costs can be daunting to an investor considering developing a new plant variety. As the House Agriculture Committee explained in 1980:

The development of a new plant variety with a higher yield or a greater resistance to a specific disease is an arduous task. In some cases, thousands of crosses must be made, documented and tested. The breeder may often spend years creating a breeding program to develop a new variety, with no guarantee of success. Once a new variety with commercial po-



tential is developed, the developer must invest in advertising, distribution, production and all the other costs of operating a business, which will ultimately determine the profitability of the venture. [H.R. Rep. No. 1115, *supra*, at 4.]

Given these costs and risks, and the lack of any prospect of a return even if the new variety turned out to be successful, it is not surprising that private seed breeding efforts were largely limited to cross pollinated crops. Such research and development that did take place with respect to self pollinated crops was undertaken by university experiment stations and government entities, at taxpayer expense. *Ibid.*

The Plant Variety Protection Act was intended to change that, by "assuring the developers of novel varieties of sexually reproduced plants of exclusive rights to sell, reproduce, import, or export such varieties" for a set period of years. H.R. Rep. No. 1605, 91st Cong., 2d Sess. 1 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 1 (1970).<sup>3</sup> The Act was prompted by developments in Western Europe, where legal protection for plant varieties had resulted in "a great flowering of plant breeding, with the concomitant benefits of a more productive national agriculture and improved agricultural export." H.R. Rep. No. 1605, *supra*, at 1-2. In England, for example, the Plant Varieties and Seeds Act of 1964 led to "a great upsurge of plant breeding," causing "a once moribund seed industry [to] show[] signs of great new vitality." *Id.* at 2.

Congress sought to achieve the same benefits for American agriculture. The key objective was to "stimulate private plant breeding," so that public expenditures could be redirected to basic research. *Ibid.* That meant ensuring private developers an opportunity to secure a return on their extensive research and development costs,

<sup>3</sup> The original period was 17 years, amended to 18 years in 1980. 7 U.S.C. § 2483(b).

by protecting their rights in novel varieties they developed and providing a remedy for infringement of those rights.

The PVPA had its intended effect. When the House Agriculture Committee looked at the PVPA ten years after it was enacted, the Committee noted that "[p]rivate investment in varietal development research has increased dramatically since passage of the [PVPA]." H.R. Rep. No. 1115, *supra*, at 5. An analysis of the number of new plant varieties showed that three times more wheat and soybean and six times more cotton varieties were developed in the decade after enactment of the Act than in the decade before. *Id.* at 4. Another report showed the number of private soybean and wheat varieties for sale rising from three to 36 from 1970 to 1979. Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, *supra*, at 2. Yet another analysis found that "the PVPA has had a significant impact on private variety research," particularly with regard to soybeans, where there was a "dramatic increase in the number of private soybean breeding programs." R. Perrin, K. Kunnings, and L. Ihnen, *Some Effects of the U.S. Plant Variety Protection Act of 1970*, Economics Research Report No. 46, Department of Economics and Business, North Carolina State University, at 31, 38 (August, 1983). Other analyses also reflect the tangible benefits in research and productivity flowing from the PVPA. See, e.g., A. Tallard, ed., *A Workshop Report: An Evaluation of the Issues, Challenges, and Opportunities Related to Plant Patenting*, 10-11 (Jan. 31-Feb. 3, 1989).

## II. BROWN BAGGING HAS EVISCERATED THE INCENTIVE PROVIDED BY THE PVPA AND LED TO ABANDONMENT OF RESEARCH PROGRAMS

Brown bagging abuses, however, have undermined the statutory incentives for private investment in research and development programs. Throughout the seed industry, the growth of brown bagging abuses has led to the



curtailment or abandonment of the sort of development programs the PVPA was designed to encourage. A proper interpretation of the saved seed exemption would have helped end such abuses, and permitted the Act to serve its intended function. Instead, the construction adopted by the court below legitimizes such abuses and will inevitably result in dramatically reduced investment in development of new and better seed varieties.

If any farmer can sell up to one-half of a crop planted with a "protected" variety as seed, the supposedly "exclusive rights to sell, reproduce, import or export such varieties" guaranteed to the developer will become a fiction. H.R. Rep. No. 1605, *supra*, at 1. Without such rights, the developer will be unwilling to incur the significant expense and undertake the commercial risk to discover and develop the novel variety in the first place. For as USDA's Economic Research Service explained, "it is the ability of seed firms to make an adequate return on their research and development that encourages such firms to develop new and better varieties." Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, *supra*, at 7.

The extent and impact of brown bagging abuses is well documented. The Agrigenetics Company, for example, markets 151 seed varieties in 12 different species. It operates several research facilities in the United States, and invests some 17 million dollars in seed research annually. One of Agrigenetics' priorities was a research program involving stripper cotton. After an investment of several million dollars, the program culminated in the introduction of GSA 71, a variety so popular it accounted for some 16 percent of all cottonseed acreage planted in the United States. Agrigenetics was compelled to abandon the program and its further efforts to improve the quality of stripper cotton, however, because while 16 percent of all cottonseed acreage was planted with GSA 71, the company had only sold enough of its protected

seed to cover five percent of the acreage planted. Brown bagging accounted for the rest.<sup>4</sup>

An Agrigenetics program to develop new varieties of hard red winter wheat met a similar fate. The program was begun in 1981 and involved an investment of more than four million dollars over the next five to six years. Although Agrigenetics developed a dozen new varieties and considerable amounts of its seed were being planted by farmers throughout the Great Plains, it soon became apparent that farmer replant and brown bagging were so prevalent that it would not be profitable to continue the program. Agrigenetics discontinued not only sale of its wheat seed varieties but the entire research program as well.<sup>5</sup>

Other seed companies have had similar experiences with brown bagging. Agripro Biosciences Inc. ("Agripro"), for example, sells 28 varieties of wheat protected under the PVPA. It commits over six million dollars per year to new product development, and employs 111 employees in its new product research program. This research program came into existence only after passage of the PVPA, and depends upon the protections afforded by the Act.

In recent years, however, brown bagging has threatened the viability of the research program. For example, 30 percent of all acres planted with wheat in Kansas in 1989-1990 were planted with Agripro seed. Although this would suggest that the Agripro research program has been very successful, it turns out that authorized sellers sold only enough protected Agripro seed to plant five percent of the acres. Agripro thus secures a return on its research and development investment in this area 83 percent less than that intended by Congress when it passed the PVPA.<sup>6</sup>

<sup>4</sup> See Brief for Amicus Curiae the Agrigenetics Company, *Asgrow Seed Company v. Winterboer*, *supra*.

<sup>5</sup> *Ibid.*

<sup>6</sup> See Brief of Agripro Biosciences Inc. as Amicus Curiae Urging Affirmance, *Asgrow Seed Company v. Winterboer*, *supra*.

This experience is quite common. Jacob Hartz Seed Co. Inc. ("Hartz"), for example, holds 18 certificates under the PVPA for soybean varieties. One of its varieties—"Hartz 5164"—is the most widely planted soybean variety in Arkansas. Hartz sells, however, no more than one-third of the seed used to grow that variety in Arkansas. Some of the shortfall is due to legitimate farmer replant, but the bulk of it is due to brown bagging abuses.<sup>7</sup>

Northrup King Company abandoned several significant seed research programs because of brown bagging. Northrup King sells approximately 185 varieties of seed and invests more than ten million dollars annually in research and development of new seed varieties. Through research facilities in Montana, Nebraska, Kansas, Minnesota, Arizona, Washington, and South Carolina, Northrup King developed several varieties of wheat, including a popular variety of hard red spring wheat known as Prodx. Prodx accounted for some 300,000 of the acres planted to hard red spring wheat in Montana in the early 1980s. Northrup King had sold, however, only enough of its protected seed to account for 22,000 acres of crop. Accordingly, Northrup King abandoned the research program, because the return it was entitled to under the PVPA was being eviscerated by brown bagging. Northrup King abandoned a stripper cottonseed program in Texas and a southern soybean program in South Carolina for the same reason.<sup>8</sup>

Brown bagging abuses have also plagued the research programs undertaken by Pioneer Hi-Bred International, Inc. The 1991 Doane U. S. Farm Soybean Seed Study found that the difference between Pioneer PVPA pro-

<sup>7</sup> See *Amicus Curiae* Brief of Jacob Hartz Seed Co. Inc. Urging Affirmance of the Decision Under Review, *Asgrow Seed Company v. Winterboer*, *supra*.

<sup>8</sup> See Brief for *Amicus Curiae* Northrup King Co., *Asgrow Seed Company v. Winterboer*, *supra*.

tected soybean units planted and units sold was 2.7 million, a loss of some 35 million dollars. Kansas agriculture statistics published in 1989 show Pioneer sales of its PVPA protected hard red winter wheat seed, variety 2157, accounted for only eight percent of the acreage planted to that variety, with brown bagging sales accounting for the other 92 percent. Not surprisingly, this led to a 1989 loss of 3.5 million dollars for Pioneer on its wheat sales, and in 1990 Pioneer discontinued its hard red winter wheat program.<sup>9</sup>

Delta and Pine Land Company holds twenty certificates under the PVPA for cottonseed and ten for soybeans. Over the five-year period ending in 1991, Delta and Pine invested 4.5 million dollars on cottonseed research and 3.6 million dollars on soybean research. Brown bagging abuses, however, have forced the company to abandon programs in each of these areas. Delta and Pine was compelled to close its cottonseed research facility in Lubbock, Texas—in the heart of the Texas High Plains cotton area—after the facility lost nearly one million dollars over a four-year period, primarily due to brown bagging. By the same token, the company was recently forced to close its soybean research facility in Wilson, North Carolina—eliminating one-half of its soybean research efforts—because of the adverse economic effect of brown bagging.<sup>10</sup>

Numerous other companies have reported curtailment of research programs. After initiating testing on soft winter wheat varieties in the mid-1980s, Golden Harvest Seeds, Inc., abandoned further varietal development plans. It determined that brown bagging would prevent it from recouping the necessary investment. Golden Harvest also decided not to add an additional soybean

<sup>9</sup> See Brief for *Amicus Curiae* Pioneer Hi-Bred International, Inc. *Asgrow Seed Company v. Winterboer*, *supra*.

<sup>10</sup> See Brief for *Amicus Curiae* Delta and Pine Land Company Urging Affirmance of the Judgment, *Asgrow Seed Company v. Winterboer*, *supra*.



research station in the western United States for the same reason.<sup>11</sup> By the same token, Stoneville Pedigreed Seed Company decided to forego its research program in Lubbock, Texas, because of brown bagging, and has affirmed that it will not allocate research expenditures to the Texas cottonseed market so long as brown bagging abuses continue to plague that market.<sup>12</sup> DeKalb Plant Genetics has curtailed its efforts to develop improved soybean varieties, the Anderson Clayton Company terminated a soybean program designed to develop new soybean varieties adapted to West Texas, and Cargill abandoned a cottonseed research program—all because of the inability to recoup investment due to brown bagging abuses.<sup>13</sup>

Indeed, the ironic fact is that the originator and certificate holder of a very successful new variety will probably sell a lesser percentage of the seed than the originator of a less successful variety. The more popular a particular variety is, the more likely that it will be a target of brown bagging abuses. See Office of Technology Assessment, *New Developments in Biotechnology: Patenting Life*, Special Report, OTA-BA-370, at 79 (GPO 1989).

### III. THE ERRONEOUS CONSTRUCTION BY THE FEDERAL CIRCUIT SANCTIONS BROWN BAGGING ABUSES AND NULLIFIES THE PROTECTION AFFORDED BY THE PVPA

The foregoing are simply a few examples of the dramatic, concrete practical impact brown bagging abuses

<sup>11</sup> See Brief for Amicus Curiae Golden Harvest Seeds, Inc. in Support of Plaintiff-Appellee, *Asgrow Seed Company v. Winterboer*, *supra*.

<sup>12</sup> See Brief for Amicus Curiae Stoneville Pedigreed Seed Company in Support of Appellee Urging Affirmance of Judgment of U.S. District Court, *Asgrow Seed Company v. Winterboer*, *supra*.

<sup>13</sup> See Brief Amicus Curiae of DeKalb Plant Genetics Urging Affirmance of the Judgment Under Review, *Asgrow Seed Company v. Winterboer*, *supra*.

have had on the sort of research and development programs Congress intended to promote through the PVPA. Quite simply, the statute does not work if extensive brown bagging is permitted, because brown bagging abuses take away the very financial incentive the Act confers on breeders. The decision below—by legitimizing brown bagging of up to 50 percent of any farmer's crop—will, if allowed to stand, render the PVPA a dead letter.

The question then becomes whether Congress enacted a statute that contained within it the seeds of its own destruction. The presumption, of course, is that Congress did not engage in a useless exercise when it enacted the statute. As the Court has recognized since its earliest days, "[o]ne portion of a statute should not be construed to annul or destroy what has been granted by another." *Peck v. Jenness*, 48 U.S. 612, 623 (1849). Instead the statute should be interpreted—if the language permits—in a manner consistent with its underlying purpose. See *Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

As explained in the petition for certiorari, a natural reading of the statutory language leads to the result that the saved seed exception limits a farmer's right to sell another's protected variety to the amount needed for next year's crop. Such a reading—unlike that adopted by the Federal Circuit—permits the Act to achieve its intended purpose, and is consistent with the "design of the statute as a whole."

The Fifth Circuit recognized the need to read the saved seed exemption in light of the purposes of the PVPA as



a whole in *Delta and Pine Land Company v. Peoples Gin Company*, 694 F.2d 1012, 1016 (5th Cir. 1983):

The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains. The less time and effort that is invested, the smaller the chance of discovering superior agricultural products. If less time and effort is invested, long-term benefits to the farmer in the form of superior crops and higher yields will be lost.

The statutory interpretation embraced by the Federal Circuit was advocated by neither party below, and precipitated five votes for in banc review and a pointed dissent from denial of in banc. As the dissenting judge noted, that interpretation renders an important congressional program a nullity. Pet. App. 30a. It also represents a crippling blow to the entire American seed industry. Research and development of new plant varieties will continue to be curtailed or abandoned altogether. To the extent the industry remains active in research, funds will be diverted to cross pollinated plants, or overseas, where the protection for developers is more secure. The experience prior to 1970 confirms that public funding of research and development is an inadequate substitute for private sector involvement, even indulging the unlikely assumption that public funding at any significant level would be available given current budget realities. The international competitiveness of American agriculture—a key component of American world trade—will suffer at a time when world-wide competition in the agricultural area is becoming increasingly intense.

Given the exclusive jurisdiction of the Federal Circuit, there is no prospect that the law will develop in a more favorable direction as future cases arise under the Act. The prospect of a legislative response to the Federal Circuit's erroneous interpretation of the Act is small comfort. First, that response is available in any case of statutory

construction, yet the Court has not ceased its practice of granting review in such cases. Second, corrective legislation is always an uncertain prospect, even in the most compelling cases, and certainly cannot be guaranteed in any reasonable time frame. Given the lead time involved in discovering, developing, and marketing a new variety, decisions on investment made now will have consequences for the state of American agriculture eight to twelve years in the future. See H.R. Rep. No. 1115, *supra*, at 4. The error below should be corrected now, and only this Court is in a position to accomplish that result.

### CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

GARY JAY KUSHNER \*  
JOHN G. ROBERTS, JR.  
MARK D. DOPP  
HOGAN & HARTSON  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5856

*Counsel for Amicus Curiae*  
*American Seed Trade Association*

\* Counsel of Record

JUN 10 1994

OFFICE OF THE CLERK

No. 92-2038

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1993

ASGROW SEED COMPANY,

*Petitioner,**v.*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,

*Respondents.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE*  
AMERICAN INTELLECTUAL PROPERTY LAW  
ASSOCIATION IN SUPPORT OF PETITIONER

AMERICAN INTELLECTUAL  
PROPERTY LAW ASSOCIATION  
GARY L. NEWTON, President  
2001 Jefferson Davis Highway  
Arlington, Virginia 22202  
(703) 415-0780

June 10, 1994

\*J. MICHAEL JAKES

FINNEGAN, HENDERSON,  
FARABOW, GARRETT  
& DUNNER

1300 I Street, N.W.  
Washington, D.C. 20005  
(202) 408-4000

*Counsel for Amicus Curiae.*

\*Counsel of Record

13 PP

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	i
STATEMENT OF INTEREST .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	3
I. The Purpose of the Plant Variety Protection Act Is To Promote Innovation in American Agriculture. ....	3
II. The Federal Circuit's Broad Interpretation of the "Farmer's Exemption" Nullifies the Act as an Incentive for Innovation .....	6
III. By Discouraging Innovation in the Seed Industry, the Federal Circuit's Decision Will Ultimately Hurt American Agriculture. ....	9
CONCLUSION .....	10

## TABLE OF AUTHORITIES

*Cases:*

<i>Delta &amp; Pine Land Co. v. Peoples Gin Co.</i> , 694 F.2d 1012 (5th Cir. 1983) .....	7, 10
--	-------

*Statutes:*

7 U.S.C. §§ 2321-2582. ....	3
7 U.S.C. §§ 2482-83 .....	4
7 U.S.C. § 2483(a) .....	4
7 U.S.C. § 2541. ....	4, 5
7 U.S.C. § 2541(3). ....	5
7 U.S.C. § 2543. ....	3, 5, 6, 7, 8, 9
7 U.S.C. § 2581. ....	4



(ii)

*Other Authorities:*

H.R. Rep. No. 1605, 91st Cong., 2d Sess. (1970),  
reprinted in 1970 U.S.C.C.A.N. 5082 ..... 4

Page

No. 92-2038

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1993

ASGROW SEED COMPANY,  
*Petitioner,*

*v.*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE*  
AMERICAN INTELLECTUAL PROPERTY LAW  
ASSOCIATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The American Intellectual Property Law Association (AIPLA) is a national association of more than 8,000 members, primarily attorneys, whose interest and practice lie in the areas of patent, copyright, trademark, trade secret, and other intellectual property law. The AIPLA's

members are employed by private law firms, corporations, universities, and government. The AIPLA has no interest in either of the parties to this case.

The AIPLA is concerned with the proper interpretation of important Federal statutes, such as the Plant Variety Protection Act (PVPA), which protect various forms of intellectual property. In particular, the AIPLA is concerned with the balance between the encouragement of innovation and the right of the public to freely reap the benefits of such innovations.

The Federal Circuit's decision in this case is troubling because it *discourages* innovation in the seed industry, thus upsetting this balance. Specifically, the decision allows farmers to sell massive quantities of novel varieties of seed in direct competition with the seed developers, diluting the rights granted by the PVPA to the point where they are meaningless. As recognized by Circuit Judge Newman in dissent, "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. C, p. 30a.

The AIPLA believes that its views will be helpful to the Court in understanding the impact of the decision below on the PVPA and, in particular, in understanding how that decision has totally upset the balance created by Congress between encouraging innovation in the seed industry and addressing the needs of farmers who use protected seed varieties. The AIPLA therefore submits this brief in support of the petitioner and urges that the decision of the Federal Circuit should be reversed.

The AIPLA has received the consent of the parties in this case to present its views.

## SUMMARY OF ARGUMENT

This case involves a question of statutory interpretation of the Plant Variety Protection Act (PVPA), which Congress enacted to provide legal protection for the developers of novel seed varieties. The Federal Circuit interpreted 7 U.S.C. §2543 of the PVPA, which allows a farmer to save seed and, in limited circumstances, to sell "such saved seed," as permitting up to *half* of a farmer's entire crop to be sold as seed. Not only is this decision at odds with the statutory language and the legislative history of the PVPA, but it frustrates the purpose of the PVPA by allowing farmers to sell novel seed varieties in direct competition with the seed developers. By authorizing this practice, the Federal Circuit's decision drastically erodes the protection for novel seed varieties that Congress intended to provide in enacting the PVPA. As a result, the seed industry's incentive to make significant investments in research and development of new seeds is severely diminished. Ultimately, the national interest will suffer by not having the greater quality and variety of agricultural products on the market that the PVPA was enacted to encourage.

## ARGUMENT

### I.

#### THE PURPOSE OF THE PLANT VARIETY PROTECTION ACT IS TO PROMOTE INNOVATION IN AMERICAN AGRICULTURE

The Plant Variety Protection Act (PVPA), 7 U.S.C. §§2321-2582, enacted by Congress in 1970, provides patent-like protection for novel varieties of sexually reproduced seed, transplants, and plants. The goal of



Congress in enacting the PVPA was to increase the competitiveness of American agricultural products in world markets and, ultimately, to result in the development of superior products more resistant to disease and higher in overall yields and quality. This purpose is reflected in the legislative history, *see* H.R. Rep. No. 1605, 91st Cong., 2d Sess. 1-3 (1970), *reprinted in* 1970 U.S.C.-C.A.N. 5082, 5082-83, as well as the language of the statute itself. 7 U.S.C. § 2581.

To achieve this purpose, the PVPA provides limited exclusive rights for a term of 18 years to breeders of novel plant varieties who obtain a Certificate of Plant Variety Protection from the Plant Variety Protection Office. 7 U.S.C. §§ 2482-83. This Certificate grants the breeder the right "to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing . . . a hybrid or different variety therefrom." 7 U.S.C. § 2483(a); *see also* 7 U.S.C. § 2541.

Through its grant of exclusive rights, the PVPA provides incentives for seed companies to increase their investments in research and development of novel seed varieties, thereby achieving the purposes of the Act. Without these exclusive rights, there is much less incentive to develop new seed varieties. Once a desirable seed variety is sold, any farmer can grow a crop with it, producing many times the quantity of the seeds originally purchased. The farmer can then sell the seeds in direct competition with the seed developer, but at a much lower price, since that farmer has not incurred the costs of developing the new seed variety.

In enacting the PVPA, Congress expressly balanced the plant breeder's exclusive rights with the practical needs

of farmers who would purchase and use the protected seed varieties. Under the Act, a farmer could, of course, sell seed produced from a protected seed variety for "other than reproductive purposes" — e.g., food or animal feed. 7 U.S.C. § 2543. With soybeans and wheat, for example, the primary value component of the crop is the seed (for uses other than reproduction), and farmers are naturally allowed to sell the seed as a crop. By limiting the purposes for which the seed could be sold, however, the Act ensures that farmers can not enter into competition with the seed developers who sell the seed, not as a crop, but for reproductive purposes.

In addition, farmers are allowed to continue their usual practice of saving part of their crop as seed for replanting on their own farms. To qualify for this exemption, however, the seed must not have been grown "as a step in marketing (for growing purposes)" the seed. *Id.*; 7 U.S.C. § 2541(3). Thus, the first sentence of section 2543 provides:

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm or for sale as provided in this section . . . .

Section 2543 also permits a farmer who does not use the seed saved pursuant to the first sentence of section 2543 to sell it to another farmer, provided that neither farmer is in the seed business:

[I]t shall not infringe any right hereunder for a person, whose primary farming occupa-



tion is the growing of crops for sale other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

*Id.* Thus, as a practical matter, the quantity of seed that a farmer can sell to another farmer *as seed* is limited to the quantity reasonably necessary for the same farmer to produce another crop of the same size as that he or she produced with the seed brought from the statutorily-protected seed development company.

## II.

### THE FEDERAL CIRCUIT'S BROAD INTERPRETATION OF THE "FARMER'S EXEMPTION" NULLIFIES THE ACT AS AN INCENTIVE FOR INNOVATION

The dilemma inherent in this case is how to interpret the scope of the exemption in section 2543 while still retaining Congress' aim in enacting the PVPA of encouraging innovation in the seed industry. In one early PVPA case, appealed before the advent of the Federal Circuit, the Fifth Circuit expressly recognized that the "farmer's exemption" in section 2543 is somewhat at odds with the primary purpose of the PVPA:

While the main body of the Act assures developers of novel varieties of the exclusive right to sell and reproduce that variety, the crop exemption dilutes that exclusivity by allowing individual farmers to sell the protected variety without liability. The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains.

*Delta & Pine Land Co. v. Peoples Gin Co.*, 694 F.2d 1012, 1016 (5th Cir. 1983). Thus, the court concluded that a narrower interpretation of the exemption was "more in keeping with Congress' primary objective." *Id.* The court further elaborated that a more narrow reading of the exemption in section 2543 "creates the greatest amount of internal harmony in the overall statutory scheme." *Id.*

Instead of reading the exemption narrowly in keeping with Congress' objective, the Federal Circuit in *Asgrow Seed* interpreted section 2543 as permitting *up to half of a farmer's entire crop to be sold as seed*. By this interpretation, the Federal Circuit has rewritten the statute and totally upset the balance desired by Congress between encouraging innovation in the seed industry and addressing the needs of farmers. "Although it may appear that the broadest reading of the exemption would benefit farmers today, it could be detrimental to their interests tomorrow." *Delta & Pine Land Co.*, 694 F.2d at 1016.

Specifically, the Federal Circuit in *Asgrow Seed* held that section 2543 does not limit the quantity of seed a farmer can save, Pet. App. A, at pp. 6a, 10a-11a, and that the only quantitative limit on sales of protected seed varieties is that the seller and buyer must be persons whose "primary occupation is the growing of crops for sale other than reproductive purposes." Pet. App. A, at pp. 7a-8a. Thus, under the court's reasoning, the only limit on the quantity of seed sales permitted under section 2543 is that a farmer must grow more crops (whether measured in tonnage or dollar value is unclear) for sale to consumers than for sale to other farmers for planting. Pet. App. A, at p. 8a. The court further held

that this "primary farming" determination must be made on a "crop-by-crop" basis with respect to each novel variety protected under the Act. *Id.*

The Federal Circuit's decision reaches a result that is totally contrary to Congress' intent in enacting the PVPA. It essentially allows farmers to sell large quantities of novel seed varieties, thus entering into competition with the seed developers. By allowing up to half of a farmer's crop to be sold as seed for reproductive purposes, the Federal Circuit authorizes this undesirable practice. Surely, allowing farmers to enter into competition with the seed developers is not the result that Congress intended in enacting the PVPA. As the district court's opinion in this case points out, allowing farmers to sell virtually unlimited quantities of seed developers' protected seed strains frustrates the intent of the PVPA. Pet. App. B, at p. 23a. The more that farmers are allowed to compete with the seed developers, the less likely it is that there will be innovation in the field. The national interests in having new and improved plants on the market will likely suffer as a result of the Federal Circuit's ruling.

Moreover, the Federal Circuit's interpretation of the statute is neither required nor supported by the statutory language or the legislative history. Although the court recognized that, "without meaningful limitations, [section 2543] could undercut much of the PVPA's incentives," Pet. App. A, at p. 12a, the limitations the court adopted find no support in the Act. Nothing in the text or the legislative history suggests that a farmer may sell up to 50% of a crop for seeding purposes as determined on a crop-by-crop basis.

A more logical reading of the statute, in keeping with the Act's purpose, is that the first sentence of section 2543 limits the quantity of saved seed subject to being sold to the quantity needed to produce another crop of the same size as the first crop. As Judge Newman explained in her dissent, section 2543 was designed to "permit continuation of the historical practice of farmers to save seed for their own use, *with occasional minor transactions with neighbors on this saved seed.*" Pet. App. C, at pp. 37a-38a (emphasis added). Such an interpretation of the statute is consistent with the statutory language, the express intent of Congress, and the stated purpose of the PVPA.

### III.

#### BY DISCOURAGING INNOVATION IN THE SEED INDUSTRY, THE FEDERAL CIRCUIT'S DECISION WILL ULTIMATELY HURT AMERICAN AGRICULTURE

The PVPA is critically important to the private seed industry's research activities in developing novel seed varieties and bringing them to the public. Without some form of legal protection against the sale of protected seed, developers of novel seed varieties will not be able to recoup their extensive research and development costs. By allowing up to half of a farmer's entire crop to be sold as seed for reproductive purposes, however, the Federal Circuit's decision drastically erodes the protection of the PVPA and discourages innovation in the seed industry.

Moreover, such a disincentive to the seed industry creates a chain effect: the less time and money the seed companies spend on research and development, the smaller the chance of discovering superior varieties of seed. The smaller the chance of discovering novel seed varieties, the less chance consumers have to reap the



benefits of such potentially superior products. *See Delta & Pine Land Co.*, 694 F.2d at 1016 (tracing long-term effects of giving broad construction to PVPA exemption). Therefore, it is clear that the effects of the Federal Circuit's decision in this case spread well beyond the private seed industry.

The Federal Circuit's decision, if left unchecked, will have potentially devastating effects on innovation in the seed industry, and consequently, the competitiveness of American agriculture. Ultimately, the national interest will likely suffer from decreased innovation in the seed industry.

#### CONCLUSION

For these reasons, the American Intellectual Property Law Association as *amicus curiae* urges this Court to reverse the decision of the Federal Circuit in this case.

Respectfully submitted,

J. MICHAEL JAKES  
FINNEGAN, HENDERSON,  
FARABOW, GARRETT  
& DUNNER  
1300 I Street, N.W.  
Washington, D.C. 20005  
(202) 408-4000  
*Counsel for Amicus Curiae.*

AMERICAN INTELLECTUAL  
PROPERTY LAW ASSOCIATION  
GARY L. NEWTON, President  
2001 Jefferson Davis Highway  
Arlington, Virginia 22202  
(703) 415-0780



JUN 10 1994

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

ASGROW SEED COMPANY,  
*Petitioner,*

v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

**BRIEF AMICUS CURIAE OF  
THE AMERICAN SEED TRADE ASSOCIATION  
IN SUPPORT OF PETITIONER**

GARY JAY KUSHNER \*  
JOHN G. ROBERTS, JR.  
MARK D. DOPP  
DAVID G. LEITCH  
HOGAN & HARTSON L.L.P.  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5856

*Counsel for Amicus Curiae  
American Seed Trade  
Association*

\* Counsel of Record

### QUESTIONS PRESENTED

1. Whether Congress, in enacting the Plant Variety Protection Act to provide incentives for private development of novel seed varieties, included within the Act an exception to its terms that eviscerates the protection afforded seed developers by allowing farmers to sell as seed up to one-half of a crop grown from a protected variety, in competition with the developer.

2. Whether Congress, in providing that certain limited sales by a farmer of a protected seed variety would not infringe the Plant Variety Protection Act, also intended implicitly to provide that the farmer's failure to give notice that the seed was a protected variety under the Act would not infringe the Act's separate provision requiring such notice.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
STATEMENT OF INTEREST OF AMICUS CURIAE..	1
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	7
I. THE ERRONEOUS CONSTRUCTION BELOW NULLIFIES CONGRESS' PURPOSE IN EN- ACTING THE PLANT VARIETY PROTEC- TION ACT OF PROVIDING ADEQUATE IN- CENTIVES FOR PRIVATE DEVELOPMENT OF NEW SEED VARIETIES .....	7
A. The PVPA Gave Birth To A New Era For The American Seed Industry By Providing An Incentive For Research And Develop- ment .....	7
B. Brown Bagging Has Eviscerated The Incen- tive Provided By The PVPA And Led To Abandonment Of Research Programs .....	10
C. The Erroneous Construction By The Federal Circuit Sanctions Brown Bagging Abuses And Nullifies The Protection Afforded By The PVPA .....	15
II. THE SAVED SEED EXEMPTION PROVIDES AN EXEMPTION FOR CERTAIN OTHER- WISE PROHIBITED SALES, NOT FOR VIO- LATIONS OF THE NOTICE PROVISION.....	18
CONCLUSION .....	20



## TABLE OF AUTHORITIES

Cases	Page
<i>Astoria Federal Savings &amp; Loan Ass'n v. Solimino</i> , 501 U.S. 104 (1991) .....	16
<i>Crandon v. United States</i> , 494 U.S. 152 (1990) .....	16
<i>Delta and Pine Land Co. v. Peoples Gin Co.</i> , 694 F.2d 1012 (5th Cir. 1983) .....	17
<i>Diamond v. Chakrabarty</i> , 447 U.S. 303 (1980) .....	8
<i>K Mart Corp. v. Cartier, Inc.</i> , 486 U.S. 281 (1988) ..	16-17
<i>Peck v. Jenness</i> , 48 U.S. 612 (1849) .....	16
<i>Rosado v. Wyman</i> , 397 U.S. 397 (1970) .....	16
<i>United States Nat'l Bank of Or. v. Independent Ins.</i> <i>Agents</i> , 113 S. Ct. 2173 (1993) .....	16
 Statutes	
7 U.S.C. §§ 2321-2582 .....	passim
7 U.S.C. § 2483 (b) .....	9
7 U.S.C. § 2541 (6) .....	5, 6, 18, 19
7 U.S.C. § 2543 .....	5, 6, 18, 19, 20
7 U.S.C. § 2567 .....	19
35 U.S.C. § 161 .....	8
 Other	
Economic Research Service, United States Depart- ment of Agriculture, <i>Intellectual Property</i> <i>Rights and the Private Seed Industry</i> , Agricultural Economic Report No. 654 (Nov. 1991) ....	7, 10, 11
H.R. Rep. No. 1115, 96th Cong., 2d Sess. (1980) ....	8, 10
H.R. Rep. No. 1605, 91st Cong., 2d Sess. (1970) ....	9, 11
Office of Technology Assessment, <i>New Develop-</i> <i>ments in Biotechnology: Patenting Life</i> , Special Report, OTA-BA-370 (GPO 1989) .....	15
R. Perrin, <i>et al.</i> , <i>Some Effects of the U.S. Plant</i> <i>Variety Protection Act of 1970</i> , Economics Re- search Report No. 46, Department of Economics and Business, North Carolina State University (August, 1983) .....	10
S. Rep. No. 1138, 91st Cong., 2d Sess. (1970) .....	9
A. Tallard, ed., <i>A Workshop Report: An Evalua-</i> <i>tion of the Issues, Challenges, and Opportunities</i> <i>Related to Plant Patenting</i> (Jan. 31-Feb. 3, 1989) .....	10

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

No. 92-2038

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

BRIEF AMICUS CURIAE OF  
THE AMERICAN SEED TRADE ASSOCIATION  
IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Seed Trade Association ("ASTA") is a voluntary nonprofit national trade association representing approximately 560 research intensive companies engaged in the discovery, development, and marketing of new seed varieties.<sup>1</sup> ASTA members annually invest

<sup>1</sup> This brief is filed pursuant to S. Ct. Rule 37.3 with the consent of the parties. The consent letters have been filed with the Clerk.

millions of dollars in the research and development of new seed varieties to make American agriculture more productive and efficient. ASTA members also receive and hold the vast majority of plant variety protection certificates issued by the Plant Variety Protection Office of the United States Department of Agriculture. ASTA members thus incur the greatest losses caused by violations of the Plant Variety Protection Act, and have a direct stake in the correct interpretation of that statute. ASTA participated as amicus curiae in this case before the Court of Appeals for the Federal Circuit, and this Court granted ASTA's motion for leave to file a brief amicus curiae at the certiorari stage. 114 S. Ct. 50 (1993).

#### STATEMENT OF THE CASE

The facts are set forth fully in petitioner's statement of the case and ASTA will not repeat them here. We note, however, that the facts fit a familiar pattern, increasingly repeated not only in connection with protected soybean varieties but with respect to wheat, cottonseed, and a wide range of other sexually reproduced plants that form the basis of American agriculture. The activity of the Winterboers that led to the present litigation—purchase of seed protected under the Plant Variety Protection Act, growth of a crop with that seed producing many multiples of the original seed purchase, and then sale to other farmers of all or most of the crop as seed in unmarked brown bags in direct competition with the owner of the seed variety, rather than sale in the market as grain or feed—has become a persistent problem threatening the entire seed industry.<sup>2</sup>

<sup>2</sup> For example, petitioner Asgrow filed at least 18 suits in 1988-1991 to enforce its PVPA certificates for soybeans. See Joint Appendix 30-31, *Asgrow Seed Co. v. Winterboer*, 982 F.2d 486 (Fed. Cir. 1992). Delta and Pine Land Company was involved in three suits in 1992 alone in response to brown bagging abuses undermining its rights to cottonseed varieties. See Federal Circuit Brief for Amicus Curiae Delta and Pine Land Company Urging Affirmance of the Judgment 18, *Asgrow Seed Co. v. Winterboer*, *supra*.

In short, the facts of this case are hardly unique. They are part of a pattern replicated throughout the country and across the full range of sexually reproduced crops. This litigation is accordingly of concern far beyond Asgrow Seed Company and the Winterboers.

#### SUMMARY OF ARGUMENT

I. A. The continued well-being and international competitiveness of American agriculture depends in large measure on the development of new seed varieties that produce greater yields and are more resistant to adverse environmental conditions, disease, and agricultural pests. Prior to 1970, the bulk of research and development in the area of sexually reproduced crops—such as soybeans, wheat, and cotton—was conducted by university extension services and government entities. Extensive private commercial investment in new sexually reproduced plant varieties was not feasible, because farmers could grow and sell many multiples of the new seed variety after the initial purchase, precluding recovery by the private investor of its significant research and development costs.

The Plant Variety Protection Act, 7 U.S.C. §§ 2321-2582, was designed to and did change that. Prompted by the success of similar legislation in England, the Act afforded patent-like protection to new seed varieties, providing the private sector an opportunity to recoup the costs of developing the new varieties. The Act was a great success, giving birth to a new era for the American seed industry. The protection afforded by the Plant Variety Protection Act offered an incentive to persist in the financially risky endeavor of trying to develop new and better seed varieties, and private funds poured into the development of new varieties. Not all research culminated in the marketing of a new variety, and not all of the new varieties that were marketed were commercially successful. When one was not, the investor lost money. But there was a dramatic increase in the number of commercially available new varieties offering greater yields and



crops more resistant to disease and pestilence. University extension services and government funding were able to be redirected to more basic research, while the private sector took up the task of developing progressively better seed varieties for the commercial market.

B. With the success of the Act and the boom in the private seed industry, however, a significant abuse of the Act developed. Farmers began selling all or portions of a crop derived from a seed variety protected under the Plant Variety Protection Act for use as seed, cutting into the supposedly protected market of the breeder. The farmer incurred none of the extensive research and development costs of the seed company, and accordingly could underprice the company by a wide margin. *See* Pet. 4 n.2. This practice—known as “brown bagging”—undermined the entire structure of the Act, for it removed the critical financial incentive for private sector investment in the first place.

The natural consequences of removing the financial incentive are increasingly evident throughout the seed industry. Companies that had established new research programs and invested millions of dollars after passage of the Plant Variety Protection Act found that, time after time, the promised financial rewards failed to materialize due to brown bagging. This was not because the seed varieties they developed were unsuccessful—the varieties became predominant in terms of the number of acres planted. The problem was that only a small portion of the seed necessary to plant those acres was purchased from the “protected” certificate holder under the Plant Variety Protection Act. The rest came from brown bagging. With the promised protection of the Act being eaten away by brown bagging abuses, company after company—Anderson Clayton, Cargill, Agrigenetics, Agripro, Jacob Hartz, Northrup King, Pioneer Hi-Bred, Delta and Pine, Golden Harvest, Stoneville Pedigreed, DeKalb, and others—was forced to abandon seed development programs and shut down research facilities.

C. The decision below, by construing the statute to permit farmers to sell as seed up to 50 percent of a crop grown from a protected variety, legitimizes much of the brown bagging that has already occurred and will certainly encourage even more. The end result will plainly be, as Judge Newman pointed out, to “nullif[y] the Plant Variety Protection Act as an incentive for innovation in agriculture.” Pet. App. 30a (dissenting from denial of rehearing in banc). Although the immediate impact will be on the seed industry, the long-term consequences will be borne by farmers themselves, who will have fewer and less beneficial seed varieties to choose from, and by consumers, who will no longer enjoy the benefits of agricultural innovation.

As explained by the petitioner, nothing in the language of the statute requires such a result. Indeed, the language instead compels an interpretation limiting the amount of protected seed a farmer may sell to the amount saved to grow another crop. Such a construction effectively prevents farmers from going into competition with the owners of seed varieties, while allowing a farmer to engage in the traditional practice of saving enough seed for next year’s crop or selling such saved seed to a neighbor if his own planting plans change. Such a construction also serves the underlying purpose of the Plant Variety Protection Act by ensuring that the incentive to develop new and better varieties is not eviscerated by an exception swallowing the rule.

II. The Federal Circuit’s error in construing the saved seed exemption of Section 2543 was compounded by its conclusion that seed sold under that exemption—in whatever amount—was exempt from the notice requirement of 7 U.S.C. § 2541(6). Section 2541(6) specifies that it is an act of infringement to “dispense” a novel variety without notice of its protected status. The saved seed exemption provides that *sales* within its terms do not infringe any rights of the owner of a protected seed variety, but the issue of *notice* is an entirely separate question. In an



action for infringement under Section 2541(6), the owner's claim is not that the *sale* of the seed violated the statute, but that the dispensing of the seed without notice did so. Nothing in Section 2543 bars such an action.

This is not only a natural reading of the statutory language, but also a necessary one to give effect to Congress' purposes in enacting the PVPA. The notice requirement of Section 2541(6) is a key to effective enforcement of the Act. Once a protected seed variety enters commerce without the requisite notice, however, it becomes exceedingly difficult for the owner of the variety to enforce its rights against those growing and marketing the variety. There is no valid reason to exempt sales under Section 2543 from the notice requirement applicable to all other sales or dispensations of a protected variety; only if the seller or buyer or both are engaged in illicit activity will there be reason to sell the seed in an unmarked, brown bag.

## ARGUMENT

### I. THE ERRONEOUS CONSTRUCTION BELOW NULLIFIES CONGRESS' PURPOSE IN ENACTING THE PLANT VARIETY PROTECTION ACT OF PROVIDING ADEQUATE INCENTIVES FOR PRIVATE DEVELOPMENT OF NEW SEED VARIETIES

#### A. The PVPA Gave Birth To A New Era For The American Seed Industry By Providing An Incentive For Research And Development

The American seed industry engages in research and development to produce novel seed varieties offering farmers higher yields and crops more resistant to adverse environmental conditions, disease, and pestilence. The need for new and better seed varieties is a continuous one. The prospect of ever-increasing yields prompts ongoing efforts, as does the need to respond continually to evolving disease and insect threats.<sup>3</sup>

Most agricultural crops are reproduced through either self or cross pollination. Self pollinated crops include soybeans, wheat, and cotton; cross pollinated crops include corn and sorghum. Prior to enactment of the Plant Variety Protection Act in 1970, the American seed industry devoted the bulk of its resources to cross pollinated crops, which were easily hybridized. The reason was simple: hybridized crops do not generate seeds that can be replanted or sold to grow another crop with the same characteristics. The developer of a successful hybrid therefore had inherent protection and a market for his product year after year, allowing him the opportunity to recoup the investment necessary to develop the hybrid in the first

<sup>3</sup> For example, new rust diseases—a particular threat to wheat crops—appear about every five years. The demand for new varieties resistant to those diseases therefore follows a similar pattern. See Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, Agricultural Economic Report No. 654, at 8 (Nov. 1991).

place. See H.R. Rep. No. 1115, 96th Cong., 2d Sess. 4 (1980).

The Plant Patent Act of 1930 reinforced this inherent protection, authorizing the developer of a new variety of an asexually reproduced plant to obtain a patent for the new variety. 35 U.S.C. § 161. The Plant Patent Act, however, was specifically limited to asexually reproduced plants. See *Diamond v. Chakrabarty*, 447 U.S. 303, 310-313 (1980).

The developer of a novel variety had no protection with respect to sexually reproduced plants. Once the new seed was sold, any farmer could grow a crop with it, generating many times the number of seeds originally purchased. See Pet. 3 (one bushel of soybean seeds produces 45 bushels of the same seeds). Because he did not incur the extensive research and development costs necessary to produce the novel variety, the farmer could sell the second-generation seed in competition with the developer at a much lower price. See Pet. 4 n.2 (Winterboers sold Asgrow's protected variety for eight dollars per bushel less than Asgrow).

The research and development costs can be daunting to an investor considering developing a new plant variety. As the House Agriculture Committee explained in 1980:

The development of a new plant variety with a higher yield or a greater resistance to a specific disease is an arduous task. In some cases, thousands of crosses must be made, documented and tested. The breeder may often spend years creating a breeding program to develop a new variety, with no guarantee of success. Once a new variety with commercial potential is developed, the developer must invest in advertising, distribution, production and all the other costs of operating a business, which will ultimately determine the profitability of the venture. [H.R. Rep. No. 1115, *supra*, at 4.]

Given these costs and risks, and the lack of any prospect of a return even if the new variety turned out to be successful, it is not surprising that private seed breeding efforts were largely limited to cross pollinated crops. Such research and development that did take place with respect to self pollinated crops was undertaken by university experiment stations and government entities, at taxpayer expense. *Ibid.*

The Plant Variety Protection Act was intended to change that, by "assuring the developers of novel varieties of sexually reproduced plants of exclusive rights to sell, reproduce, import, or export such varieties" for a set period of years. H.R. Rep. No. 1605, 91st Cong., 2d Sess. 1 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 1 (1970).<sup>4</sup> The Act was prompted by developments in Western Europe, where legal protection for plant varieties had resulted in "a great flowering of plant breeding, with the concomitant benefits of a more productive national agriculture and improved agricultural export." H.R. Rep. No. 1605, *supra*, at 1-2. In England, for example, the Plant Varieties and Seeds Act of 1964 led to "a great upsurge of plant breeding," causing "a once moribund seed industry [to] show[] signs of great new vitality." *Id.* at 2.

Congress sought to achieve the same benefits for American agriculture. The key objective was to "stimulate private plant breeding," so that public expenditures could be redirected to basic research. *Ibid.* That meant ensuring private developers an opportunity to secure a return on their extensive research and development costs, by protecting their rights in novel varieties they developed and providing a remedy for infringement of those rights.

The PVPA had its intended effect. When the House Agriculture Committee looked at the Act ten years after it was enacted, the Committee noted that "[p]rivate in-

<sup>4</sup> The original period was 17 years, amended to 18 years in 1980. 7 U.S.C. § 2483(b).



vestment in varietal development research has increased dramatically since passage of the [Act]." H.R. Rep. No. 1115, *supra*, at 5. An analysis of the number of new plant varieties showed that three times more wheat and soybean and six times more cotton varieties were developed in the decade after enactment of the Act than in the decade before. *Id.* at 4. Another report showed the number of private soybean and wheat varieties for sale rising from three to 36 from 1970 to 1979. Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, *supra*, at 2. Yet another analysis found that "the PVPA has had a significant impact on private variety research," particularly with regard to soybeans, where there was a "dramatic increase in the number of private soybean breeding programs." R. Perrin, *et al.*, *Some Effects of the U.S. Plant Variety Protection Act of 1970*, Economics Research Report No. 46, Department of Economics and Business, North Carolina State University, at 28, 31 (August, 1983). Other analyses also reflect the tangible benefits in research and productivity flowing from passage of the Act. See, e.g., A. Tallard, ed., *A Workshop Report: An Evaluation of the Issues, Challenges, and Opportunities Related to Plant Patenting*, 10-11 (Jan. 31-Feb. 3, 1989).

**B. Brown Bagging Has Eviscerated The Incentive Provided By The PVPA And Led To Abandonment Of Research Programs**

The brown bagging abuses at issue in this case have undermined the incentives created by Congress for private investment in research and development programs. Throughout the seed industry, the growth of brown bagging has led to the curtailment or abandonment of the sort of development programs the PVPA was designed to encourage. The interpretation of the saved seed exemption adopted by the court below legitimizes such abuses and—if allowed to stand—will inevitably result in dra-

matically reduced investment in development of new and better seed varieties.

If any farmer can sell up to one-half of a crop planted with a "protected" variety as seed, the supposedly "exclusive rights to sell, reproduce, import, or export such varieties" guaranteed to the developer will become a fiction. H.R. Rep. No. 1605, *supra*, at 1. Without such rights, the developer will be unwilling to incur the significant expense and undertake the commercial risk to discover and develop the novel variety in the first place. For, as USDA's Economic Research Service explained, "[i]t is the ability of seed firms to make an adequate return on their research and development that encourages such firms to develop new and better varieties." Economic Research Service, United States Department of Agriculture, *Intellectual Property Rights and the Private Seed Industry*, *supra*, at 7.

The extent and impact of brown bagging abuses is well documented. The Agrigenetics Company, for example, markets 151 seed varieties in 12 different species. It operates several research facilities in the United States, and invests some 17 million dollars in seed research annually. One of Agrigenetics' priorities was a research program involving stripper cotton. After an investment of several million dollars, the program culminated in the introduction of GSA 71, a variety so popular it accounted for some 16 percent of all cottonseed acreage planted in the United States. Agrigenetics was compelled to abandon the program and its further efforts to improve the quality of stripper cotton, however, because while 16 percent of all cottonseed acreage was planted with GSA 71, the company had only sold enough of its protected seed to cover five percent of the acreage planted. Brown bagging accounted for the rest.<sup>5</sup>

<sup>5</sup> See Federal Circuit Brief for Amicus Curiae the Agrigenetics Company, *Asgrow Seed Co. v. Winterboer*, *supra*.



An Agrigenetics program to develop new varieties of hard red winter wheat met a similar fate. The program was begun in 1981 and involved an investment of more than four million dollars over the next five to six years. Although Agrigenetics developed a dozen new varieties and considerable amounts of its seed were being planted by farmers throughout the Great Plains, it soon became apparent that farmer replant and brown bagging were so prevalent that it would not be profitable to continue the program. Agrigenetics discontinued not only sale of its wheat seed varieties but the entire research program as well.<sup>6</sup>

Other seed companies have had similar experiences with brown bagging. Agripro Biosciences Inc. ("Agripro"), for example, sells 28 varieties of wheat protected under the PVPA. It commits over six million dollars per year to new product development, and employs 111 employees in its new product research program. This research program came into existence only after passage of the PVPA, and depends upon the protections afforded by the Act.

In recent years, however, brown bagging has threatened the viability of the research program. For example, 30 percent of all acres planted with wheat in Kansas in 1989-1990 were planted with Agripro seed. Although this would suggest that the Agripro research program has been very successful, it turns out that authorized sellers sold only enough protected Agripro seed to plant five percent of the acres. Agripro thus secures a return on its research and development investment in this area 83 percent less than that intended by Congress when it passed the PVPA.<sup>7</sup>

This experience is quite common. Jacob Hartz Seed Co. Inc. ("Hartz"), for example, holds 18 certificates

<sup>6</sup> *Ibid.*

<sup>7</sup> See Federal Circuit Brief of Agripro Biosciences Inc. as *Amicus Curiae* Urging Affirmance, *Asgrow Seed Co. v. Winterboer*, *supra*.

under the PVPA for soybean varieties. One of its varieties—"Hartz 5164"—is the most widely planted soybean variety in Arkansas. Hartz sells, however, no more than one-third of the seed used to grow that variety in Arkansas. Some of the shortfall is due to legitimate farmer replant, permitted under the Act, but the bulk of it is due to brown bagging abuses.<sup>8</sup>

Northrup King Company abandoned several significant seed research programs because of brown bagging. Northrup King sells approximately 185 varieties of seed and invests more than ten million dollars annually in research and development of new seed varieties. Through research facilities in Montana, Nebraska, Kansas, Minnesota, Arizona, Washington, and South Carolina, Northrup King developed several varieties of wheat, including a popular variety of hard red spring wheat known as Prodx. Prodx accounted for some 300,000 of the acres planted to hard red spring wheat in Montana in the early 1980s. Northrup King had sold, however, only enough of its protected seed to account for 22,000 acres of crop. Accordingly, Northrup King abandoned the research program, because the return it was entitled to under the PVPA was being eviscerated by brown bagging. Northrup King abandoned a stripper cottonseed program in Texas and a southern soybean program in South Carolina for the same reason.<sup>9</sup>

Brown bagging abuses have also plagued the research programs undertaken by Pioneer Hi-Bred International, Inc. The 1991 Doane U. S. Farm Soybean Seed Study found that the difference between Pioneer PVPA protected soybean units planted and units sold was 2.7 million, a loss of some 35 million dollars. Kansas agricul-

<sup>8</sup> See Federal Circuit *Amicus Curiae* Brief of Jacob Hartz Seed Co. Inc. Urging Affirmance of the Decision Under Review, *Asgrow Seed Co. v. Winterboer*, *supra*.

<sup>9</sup> See Federal Circuit Brief for *Amicus Curiae* Northrup King Co., *Asgrow Seed Co. v. Winterboer*, *supra*.

ture statistics published in 1989 show Pioneer sales of its PVPA protected hard red winter wheat seed, variety 2157, accounted for only eight percent of the acreage planted to that variety, with brown bagging sales accounting for the other 92 percent. Not surprisingly, this led to a 1989 loss of 3.5 million dollars for Pioneer on its wheat sales, and in 1990 Pioneer discontinued its hard red winter wheat program.<sup>10</sup>

Delta and Pine Land Company holds twenty certificates under the PVPA for cottonseed and ten for soybeans. Over the five-year period ending in 1991, Delta and Pine invested 4.5 million dollars on cottonseed research and 3.6 million dollars on soybean research. Brown bagging abuses, however, have forced the company to abandon programs in each of these areas. Delta and Pine was compelled to close its cottonseed research facility in Lubbock, Texas—in the heart of the Texas High Plains cotton area—after the facility lost nearly one million dollars over a four-year period, primarily due to brown bagging. By the same token, the company was recently forced to close its soybean research facility in Wilson, North Carolina—eliminating one-half of its soybean research efforts—because of the adverse economic effect of brown bagging.<sup>11</sup>

Numerous other companies have reported curtailment of research programs. After initiating testing on soft winter wheat varieties in the mid-1980s, Golden Harvest Seeds, Inc., abandoned further varietal development plans. It determined that brown bagging would prevent it from recouping the necessary investment. Golden Harvest also decided not to add an additional soybean research station in the western United States for the same

<sup>10</sup> See Federal Circuit Brief for *Amicus Curiae* Pioneer Hi-Bred International, Inc., *Asgrow Seed Co. v. Winterboer*, *supra*.

<sup>11</sup> See Federal Circuit Brief for *Amicus Curiae* Delta and Pine Land Company Urging Affirmance of the Judgment, *Asgrow Seed Co. v. Winterboer*, *supra*.

reason.<sup>12</sup> By the same token, Stoneville Pedigreed Seed Company decided to forego its research program in Lubbock, Texas, because of brown bagging, and has affirmed that it will not allocate research expenditures to the Texas cottonseed market so long as brown bagging abuses continue to plague that market.<sup>13</sup> DeKalb Plant Genetics has curtailed its efforts to develop improved soybean varieties, the Anderson Clayton Company terminated a soybean program designed to develop new soybean varieties adapted to West Texas, and Cargill abandoned a cottonseed research program—all because of the inability to recoup investment due to brown bagging abuses.<sup>14</sup>

Indeed, the ironic fact is that the originator and certificate holder of a very successful new variety will probably sell a lesser percentage of the seed than the originator of a less successful variety. The more popular a particular variety is, the more likely that it will be a target of brown bagging abuses. See Office of Technology Assessment, *New Developments in Biotechnology: Patenting Life*, Special Report, OTA-BA-370, at 79 (GPO 1989).

### **C. The Erroneous Construction By The Federal Circuit Sanctions Brown Bagging Abuses And Nullifies The Protection Afforded By The PVPA**

The foregoing are simply a few examples of the dramatic, concrete practical impact brown bagging abuses have had on the sort of research and development programs Congress intended to promote through the PVPA. Quite

<sup>12</sup> See Federal Circuit Brief for *Amicus Curiae* Golden Harvest Seeds, Inc. in Support of Plaintiff-Appellee, *Asgrow Seed Co. v. Winterboer*, *supra*.

<sup>13</sup> See Federal Circuit Brief for *Amicus Curiae* Stoneville Pedigreed Seed Company in Support of Appellee Urging Affirmance of Judgment of U.S. District Court, *Asgrow Seed Co. v. Winterboer*, *supra*.

<sup>14</sup> See Federal Circuit Brief *Amicus Curiae* of DeKalb Plant Genetics Urging Affirmance of the Judgment Under Review, *Asgrow Seed Co. v. Winterboer*, *supra*.



simply, the statute does not work if extensive brown bagging is permitted, because brown bagging abuses take away the very financial incentive the Act confers on breeders. The decision below—by legitimizing brown bagging of up to 50 percent of any farmer's crop—will, if allowed to stand, render the PVPA a dead letter. See Pet. App. 30a (decision below “nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture”) (Newman, J., dissenting from denial of rehearing in banc).

The question then becomes whether Congress enacted a statute that contained within it the seeds of its own destruction. The presumption, of course, is that Congress did not engage in a useless exercise when it enacted the statute. As the Court has recognized since its earliest days, “[o]ne portion of a statute should not be construed to annul or destroy what has been granted by another.” *Peck v. Jenness*, 48 U.S. 612, 623 (1849). See *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (“we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof”); *Rosado v. Wyman*, 397 U.S. 397, 415 (1970) (“courts should construe all legislative enactments to give them some meaning”).

Instead the statute should be interpreted—if the language permits—in a manner consistent with its underlying purpose. See *United States Nat'l Bank of Or. v. Independent Ins. Agents*, 113 S. Ct. 2173, 2182 (1993) (“Over and over we have stressed that ‘[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy’”) (quotation omitted); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy”); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the

statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole”).

As explained by the petitioner, a natural reading of the statutory language leads to the result that the saved seed exception limits a farmer's right to sell another's protected variety to the amount needed for next year's crop. Such a reading—unlike that adopted by the Federal Circuit—also permits the Act to achieve its intended purpose, and is consistent with the “object and policy” of the Act and the “design of the statute as a whole.”

The Fifth Circuit recognized the need to read the saved seed exemption in light of the purposes of the PVPA as a whole in *Delta and Pine Land Co. v. Peoples Gin Co.*, 694 F.2d 1012, 1016 (5th Cir. 1983):

The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains. The less time and effort that is invested, the smaller the chance of discovering superior agricultural products. If less time and effort is invested, long-term benefits to the farmer in the form of superior crops and higher yields will be lost.

The Federal Circuit's decision represents a crippling blow to the entire American seed industry. Research and development of new plant varieties will continue to be curtailed or abandoned altogether. To the extent the industry remains active in research, funds will be diverted to cross pollinated plants, or overseas, where the protection for developers is more secure. The experience prior to 1970 confirms that public funding of research and development is an inadequate substitute for private sector involvement, even indulging the unlikely assumption that public funding at any significant level would be available given current budget realities. The international competitiveness of American agriculture—a key component of American world trade—will suffer at a time when



world-wide competition in the agricultural area is becoming increasingly intense.

The Plant Variety Protection Act, if properly interpreted, would achieve the congressional purpose of avoiding these adverse consequences and permit the American seed industry to flourish once more. This Court should reverse the Federal Circuit and restore the Act that Congress both intended and enacted.

## II. THE SAVED SEED EXEMPTION PROVIDES AN EXEMPTION FOR CERTAIN OTHERWISE PROHIBITED SALES, NOT FOR VIOLATIONS OF THE NOTICE PROVISION

This Court also granted certiorari on a second question: whether those sales that are authorized under the saved seed exemption remain subject to the provision of the Plant Variety Protection Act specifying that it is an infringement of the rights of the owner of a novel variety to "dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received." 7 U.S.C. § 2541(6). A careful reading of the saved seed exemption establishes that it furnishes no immunity for violations of this notice provision. Such a reading is not only compelled by the language of the exemption, but also by Congress' purpose in enacting the PVPA.

The saved seed exemption provides that "it shall not infringe any right hereunder" for a farmer to use "saved seed" within the meaning of the exemption "in the production of a crop for use on his farm, or for sale as provided in this section." 7 U.S.C. § 2543. The import of this statutory language is that it does not violate the Act for a person to use saved seed—subject to the limitation in the exemption, *see* p. 17, *supra*—for growing his own crops or for sale. Nothing in this language suggests that it also does not violate the Act for the person to fail to give the notice required under 7 U.S.C. § 2541(6). Section 2543 specifies that saving seed or selling such saved

seed is not a violation. An action for violating the notice provision would not claim, however, that the defendant's acts of saving or selling violated the Act, but rather that the failure to provide the requisite notice did so.<sup>15</sup>

Giving or failing to give notice is an act separate from the act of selling saved seed. Seed can be sold with or without notice, and the notice provisions apply whether or not there is a sale. The statute prohibits "dispens[ing]" without notice, not simply selling without notice. An exemption specifying that acts of selling will not infringe any rights does not speak in any way to the question of liability for failure to give notice.

To illustrate the principle, an amnesty providing that no one would be prosecuted for acts of trespass committed at a particular location on a particular day would not immunize from prosecution a defendant discovered to have committed murder, even if the murder occurred during the immunized trespassing. So too here the immunity from infringement actions conferred by Section 2543 for certain acts of selling in no way confers immunity for failure to give required notice when dispensing a protected variety, even if the failure to give notice accompanied an immunized sale.

The notice requirement in Section 2541(6)—the counterpart of marking provisions in patent and copyright law—is a key to effective implementation of the PVPA. As is true with respect to intellectual property generally, once a protected seed variety enters commerce without the requisite notice, it becomes exceedingly difficult for the owner of the variety to enforce its rights against those growing and marketing the variety. *Cf.* 7 U.S.C. § 2567 (if protected variety distributed by owner and received by infringer without notice label, proof of actual notice to infringer required). Yet effective enforcement is the

<sup>15</sup> Asgrow's complaint separately alleges that the Winterboers dispensed the protected varieties without the notice required under 7 U.S.C. § 2541(6). *See* J.A. 38-39.

key to the implementation of any scheme of property protection. There is simply no valid reason to exempt sales under Section 2543 from the notice requirement applicable to any other sale of a protected variety, and neither the Federal Circuit nor the Winterboers have suggested any. Requiring notice does not inhibit permissible sales under that Section; indeed, if the seller is in fact acting legitimately, he ought to *want* to emblazon his brown bags with the fact that the seed he is selling is a protected variety. Only if the sale is actually outside the exemption of Section 2543, or if the seller is a willing co-conspirator with the buyer who plans to market a crop grown from the seed as seed, is there a reason for the participants in the sale to avoid notice.

Here again the Court is presented with a natural reading of the statute that is consistent with the over-all structure of the Act and also necessary to implement the legislative purpose. *See* cases cited at pp. 16-17, *supra*. This Court should adopt that reading to ensure that the statute enacted by Congress remains capable of effective enforcement, as intended by Congress.

#### CONCLUSION

For the foregoing reasons, and those in the Petitioner's brief, this Court should reverse the decision below.

Respectfully submitted,

GARY JAY KUSHNER \*  
JOHN G. ROBERTS, JR.  
MARK D. DOPP  
DAVID G. LEITCH  
HOGAN & HARTSON L.L.P.  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004  
(202) 637-5856  
*Counsel for Amicus Curiae*  
*American Seed Trade*  
*Association*

\* Counsel of Record

(3)  
No. 92-2038

Supreme Court, U.S.

FILED

JUN 10 1994

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

ASGROW SEED COMPANY,  
*Petitioner,*  
v.

DENNY WINTERBOER and BECKY WINTERBOER  
d/b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

BRIEF FOR JAMES G. McDONALD  
AS AMICUS CURIAE  
IN SUPPORT OF NEITHER PARTY

STEPHEN GORDON  
(Counsel of Record)  
1016 16th Street, N.W.  
Third Floor  
Washington, DC 20036  
(202) 862-4400  
*Attorney for the Amicus*



**BRIEF FOR JAMES G. McDONALD  
AS AMICUS CURIAE  
IN SUPPORT OF NEITHER PARTY**

---

**INTEREST OF AMICUS CURIAE**

*Amicus*, James G. McDonald, a registered civil engineer and a registered geotechnical engineer, is a law student with a serious interest in intellectual property who intends to practice law in that specialty. *Amicus* was raised in northern Indiana amongst relatives with a long tradition of farming and by a father who was awarded more than a dozen patents, including several with agricultural applications. As a civil engineer with the United Nations, *amicus'* assignment in North Yemen allowed him to observe the importance to a farmer in a traditional agrarian society of saving seed, as he saw farmers carefully sorting the seeds of a crop into a large pile for consumption and a smaller pile for the next season's crop. Historically, failure to save seed means starvation.

*Amicus* supports neither party. *Amicus* believes that his unique combination of experience, knowledge, and intent give him an advantage in examining the statute. *Amicus* believes his brief would be of assistance to the Court in interpreting the statute and in evaluating whether the purposes of the statute are met.

**SUMMARY OF ARGUMENT**

When the critical phrases of § 2543 of the PVPA are examined, it is clear that the quantity of "such saved seed" is a certain quantity. This certain quantity is that amount needed to produce a crop equal in yield to the first crop. Additionally, since premiums can be collected for the full 18 year protected period, the intent of the act is met by the interpretation of the *amicus*.

## ARGUMENT

A. The Federal Circuit erred in its interpretation of § 2543 of the Plant Variety Protection Act.

The first question presented is "[w]hether the Federal Circuit erred as a matter of law in holding that 7 U.S.C. § 2543 permits up to half a farmer's crop produced from a protected novel plant variety to be sold as seed in competition with the owner of the novel variety?" The question can be resolved if the term "such saved seed" in § 2543 can be defined as a precise quantity. Section 2543, "The Right to save seed; crop exemption," of the Plant Variety Protection Act ("PVPA"), 7 U.S.C. § 2321 *et seq.* (1988).

An examination of the § 2543 critical clause "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section" demonstrates that a specific quantity for a particular farmer can be precisely determined. A basic rule of statutory construction as articulated by the Court in *Diamond v. Diehr*, 450 U.S. 175, 182 (1981), dictates that words will be interpreted as taking their ordinary, contemporary, common meaning unless otherwise defined. In its second definition of the word "such," *Webster's New World Dictionary* (2nd college ed. 1978), defines "such" to mean "certain but not specified," a definition which supports the position that for a particular farmer the saved seed is a known quantity.

The critical definitional clause of the § 2543 uses parallel construction. The phrase as "in the production of a crop" is parallel to the phrase "for sale as provided in this section." Such parallel construction indicates that the two prepositional phrases are equivalent. The phrase dealing with the sale of seed is very general, while the phrase dealing with the production of a crop is more specific. Ordinary rules of statutory construction dictate that the specific govern the general. *Sutherland Statutory Construction* § 47.17 (5th ed. 1992). Therefore, "in the pro-

duction of a crop" is the controlling phrase because it has greater specificity.

Examining the phrase "in the production of a crop," the first definition of the word "a" means "one." *Webster's*. Therefore, "a crop" means a single crop, not multiples of a crop. According to the third definition of "crop" in *Webster's*, a "crop" signifies "the yield of any product in one season or place." "[C]rop exemption" in the title of § 2543 means an exemption for the *first* crop grown from the protected seed, as well as subsequent crops, as is made clear by the PVPA's legislative history. H.R. Rep. 91-1605, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S.C.C.A.N. 5093. That first crop for an individual farmer is of known yield, produced during one season, and in one place. Terms in a statute should be used with the same meaning, therefore "crop" in the critical phrase must mean a crop equal in yield to the first crop.

It then follows that "such saved seed" means a quantity of seed specific to the farmer to yield such a crop. Since the two prepositional phrases are equal, with the more specific controlling the general, the quantity of seed that can be "for sale as provided in this section" is the same quantity as used to produce a crop equivalent in yield to the first crop, contrary to the result reached by the Federal Circuit.

The answer to the first question presented is that the Federal Circuit erred.

B. Contrary to the intent of Congress, the Federal Circuit's interpretation fails to give any encouragement for research.

The *amicus'* above-interpretation of the statute meets the intent of the PVPA as stated in § 2581: "It is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end, so as to *afford adequate encouragement for research*, and for marketing when appropriate,



to yield the public the benefits of new varieties. Constitutional clauses 3 and 8 of Article 1, section 8 are both relied upon." (emphasis added).

The decision of the Federal Circuit does not satisfy the intent of the PVPA, as it allows farmers to sell almost half of each crop into the seed market. As a result of the Federal Circuit's interpretation, the owner/developer knows that he will have to recover all of his research and development costs during the first season of sale because he will face in following seasons innumerable competitors created from his first season's sales. The owner/developer of seed has one season to recoup his development costs, which is exactly the same amount of protection he would have received if the PVPA had never been enacted by Congress. The Federal Circuit has eviscerated the PVPA incentives for seed research and development. As a result, the public will not get the stable seed varieties intended by Congress.

The PVPA does not guarantee the recovery of research and development costs, but it does supply a legal monopoly over the sale of a protected seed variety for an 18 year period. This protection gives the prospective owner/developer information in calculating whether he will be able to recover his investment costs through premiums on the sale of the protected seed. The intent of the PVPA is met if the owner has the ability to collect a premium on every usage of the seed. It should be noted that allowing the farmer to save seed to create a second crop does not create a loss of premiums for the owner/developer. The owner/developer knows when selling—and the farmer knows when buying—that seed may be saved to grow a second crop and a subsequent crop each year. Each party will take that fact into account in determining the seed price acceptable to each. The owner/developer will include a premium in the price of the original seed for that second crop and for *each* subsequent "saved seed" crop.

Additionally, the importance of keeping seed within the protection of the PVPA is shown by a simple soybean seed example. Each soybean seed when planted produces 45 seeds. One pound of protected soybean seed which escapes the protection of the PVPA, becomes by the end of the 18 year period of statutory protection, six septillion tons (or 12,000,000,000,000,000,000,000,000 pounds) of seed. This seemingly incomprehensible amount would all have been produced outside the control of the owner/developer, completely dwarfing his ownership interests and any opportunity to collect a deserved premium on his novel seed.

The *amicus'* interpretation allows the owner/developer to know that during the 18 year protected period, he will be able to collect a premium on all seed sold or saved, which will lead to the production of the stable seed varieties as intended by Congress in its passage of the PVPA. The interpretation of the *amicus* satisfies the intent of the PVPA in that it affords adequate encouragement for research.

#### CONCLUSION

For the reasons above, the case should be remanded to the Federal Circuit.

Respectfully submitted,

STEPHEN GORDON  
(Counsel of Record)  
1016 16th Street, N.W.  
Third Floor  
Washington, DC 20036  
(202) 862-4400  
*Attorney for the Amicus*



15  
No. 92-2038

Supreme Court, U.S.  
FILED

AUG 1 1994

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

ASGROW SEED COMPANY,  
*Petitioner,*  
v.

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

BRIEF OF TED COOK AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS

MARY HELEN SEARS \*  
THE M. H. SEARS LAW FIRM,  
CHARTERED  
2300 N Street, N.W.  
Sixth Floor  
Washington, D.C. 20037  
(202) 663-9048  
*Counsel for Amicus Curiae*  
*Ted Cook*

\* Counsel of Record

## TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE .....	1
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	5
I. THE PVPA DOES NOT PROMOTE PROGRESS IN PLANT BREEDING BECAUSE IT REWARDS ATTAINMENT OF ONLY A SCINTILLA OF NOVELTY .....	5
II. THE PATENT CLAUSE OF THE CONSTITUTION DOES NOT AUTHORIZE THE PVPA .....	7
III. THE IMPERATIVES OF THE CONSTITUTIONAL PATENT CLAUSE CANNOT BE CIRCUMVENTED BY RESORT TO THE COMMERCE CLAUSE .....	12
CONCLUSION .....	17

## TABLE OF AUTHORITIES

Cases	Page
<i>Anderson's-Black Rock v. Pavement Salvage Co.</i> , 396 U.S. 56 (1969) .....	7
<i>Atlantic Works v. Brady</i> , 107 U.S. 192 (1883) .....	10, 11
<i>Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation</i> , 402 U.S. 313 (1971) .....	9
<i>Bonito Boats, Inc. v. Thunder Craft Boats, Inc.</i> , 489 U.S. 141 (1989) .....	9, 10
<i>Deepsouth Packing Co. v. Laitram Corp.</i> , 406 U.S. 518 (1972) .....	9
<i>Graham v. John Deere Co.</i> , 383 U.S. 1 (1966) .....	4, 13
<i>Hollister v. Benedict &amp; Burnham Mfg. Co.</i> , 113 U.S. 59 (1885) .....	8
<i>Hotchkiss v. Greenwood</i> , 52 U.S. (11 How.) 248 (1850) .....	8
<i>Kendall v. Winsor</i> , 62 U.S. (21 How.) 322 (1858) ..	9
<i>Lear, Inc. v. Adkins</i> , 395 U.S. 633 (1969) .....	9
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) .....	15, 16
<i>Mercoid-Corp. v. Mid-Continent Inv. Co.</i> , 320 U.S. 661 (1944) .....	9
<i>Motion Picture Patents Co. v. Universal Film Mfg. Co.</i> , 243 U.S. 502 (1917) .....	9
<i>Pearce v. Mulford</i> , 102 U.S. 112 (1880) .....	8
<i>Pennock v. Dialogue</i> , 27 U.S. (2 Pet.) 1 (1829) .....	8, 9
<i>Phillips v. Detroit</i> , 111 U.S. 604 (1884) .....	8
<i>Picard v. United Aircraft Corp.</i> , 128 F.2d 632 (2d Cir. 1942) .....	12
<i>Railway Labor Executives Assn. v. Gibbons</i> , 455 U.S. 457 (1982) .....	16
<i>Sakraida v. Ag Pro, Inc.</i> , 425 U.S. 273 (1976) .....	8
<i>Shaw v. Cooper</i> , 32 U.S. (7 Pet.) 292 (1833) .....	9
<i>Thompson v. Boisselier</i> , 114 U.S. 1 (1885) .....	8
<i>Constitution and Statutes</i>	
United States Constitution	
Article I, section 8, cl. 8 (Patent Clause) .....	4, 7, 12, 16
Article I, section 8, cl. 3 (Commerce Clause) .....	12, 15, 16

## TABLE OF AUTHORITIES—Continued

	Page
7 U.S.C. §§ 2321-2582 (1988) (Plant Variety Pro- tection Act) .....	passim
7 U.S.C. § 2401(a) (1988) .....	5
7 U.S.C. § 2543 (1988) .....	17
7 U.S.C. § 2581 (1988) .....	11
7 U.S.C. § 2581 (1970) .....	11
<i>Other Authorities</i>	
Bugbee, GENESIS OF AMERICAN PATENT AND COPY- RIGHT LAW (1967) .....	14
Flynn, <i>The Orphan Drug Act: An Unconstitutional Exercise of the Patent Power</i> , 1992 Utah L. Rev. 389 .....	12, 16
Fox, MONOPOLIES AND PATENTS (1947) .....	13
Frumkin, THE EARLY HISTORY OF PATENTS FOR INVENTION (1947) .....	14
Irons and Sears, <i>The Constitutional Standard of Invention—The Touchstone for Patent Reform</i> 1973 Utah L. Rev. 653 .....	15
Lutz, <i>The Constitution v. the Supreme Court—Re Patents for Inventions</i> , 13 U. Pitt. L. Rev. 449 (1952) .....	12
National Gazette, March 29, 1792 .....	14
Posnack, <i>The Continued Erosion of our Patent System</i> 52 J. Pat. Off. Soc'y 225 (1970) .....	12
Prager, <i>A History of Intellectual Property from 1545 to 1787</i> , 26 J. Pat. Off. Soc'y 711 (1944) .....	13
Prager, <i>Standards of Patentable Inventions from 1474 to 1952</i> , 2 U. Chi. L. Rev. 69 (1952) .....	13
Robinson, PATENTS (1890) .....	15
Seidel, <i>The Constitution and a Standard of Patent- ability</i> , 48 J. Pat. Off. Soc'y 5 (1966) .....	12
THE COMPLETE MADISON (S. K. Padover ed. 1953) ..	14
WRITINGS OF THOMAS JEFFERSON (Washington Ed. 1814) .....	13, 14



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1994

---

No. 92-2038

---

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

---

BRIEF OF TED COOK AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS

---

**INTEREST OF THE AMICUS CURIAE**

This brief is submitted on behalf of Ted Cook, an owner with members of his family, of Four Rivers Seed Company ("Four Rivers") of Cardwell, Montana. Four Rivers is in the business of operating a 400-acre potato farm on which it develops and sells seed potatoes to commercial growers who, in turn, sell potatoes to large supermarkets and retailers.

Four Rivers Seed Company currently grows seven varieties of the western russet potato, which it obtains initially from the state agriculture research and land grant uni-

versities programs at the University of Montana and University of Idaho. These programs develop sexually reproduced plant varieties in conjunction with the United States Department of Agriculture's Agriculture Research Service. In certain circumstances, through selective breeding of the varieties obtained, Four Rivers has itself developed refined seed potato varieties more suitable to the local growing environment, and more resistant to indigenous pests and diseases.

Four Rivers obtains the varieties it grows in the form of potato plant tissue segments (known as "seed potatoes" in farming circles) from the state research centers. The tissue segments are then grown under contract into very small plants which are next divided and grown in pods numbering from 25,000 to 45,000. Seed potatoes from the third generation of these plants, after weaker and diseased plants have been eliminated in each generation, are then sold to commercial potato growers. Cultivars from the second generation of the plants are also sold to other seed potato breeders.

The interest of Mr. Cook and Four Rivers in this proceeding results from the present consideration in Congress of legislation making seed potatoes subject to the Plant Variety Protection Act ("PVPA").

Mr. Cook and Four Rivers have a primary concern, if the legislation is enacted (as now seems likely), that the giant pharmaceutical and chemical companies that have recently entered aggressively into agribusiness will use the PVPA to monopolize the market in seed potatoes to the detriment of the small farmer and breeder. This is expected to be effected in two ways.

First, experience has demonstrated that the large agribusiness companies have been successful under PVPA in redirecting, sharply reducing, or even eliminating the research activities of the U.S. Department of Agriculture and the university research centers in connection with the

development of those sexually reproduced plant varieties now covered by PVPA. When the state university systems cease work on seed potatoes, Four Rivers will lose its primary source of new varieties thereof and will therefore be unable to conduct its established business in the same way it has done heretofore.

Second, experience under PVPA has further shown that notwithstanding their protestations, in this Court and elsewhere, to the effect that PVPA has stimulated commercial firms to conduct research into the genetics of sexually reproduced plant varieties, the giant agribusiness entrants have largely merely made minor alterations in known plant varieties previously developed by state research centers or by U.S.D.A. and then obtained PVPA certificates of exclusivity for each slightly altered variant.

Mr. Cook therefore anticipates that as a competing small breeder and grower, Four Rivers will either be denied access to seed potato variants protected by PVPA certificates or else it will be required to pay a significant premium, most likely in the form of a royalty, in order to obtain PVPA-protected seed potatoes that do not offer any corresponding improvement in potato product quality. In the same vein, acceptance by this Court of Petitioner's arguments in this case would—in the likely event that Congress subjects seed potatoes to PVPA—severely attenuate the rights of Four Rivers to sell seed potatoes to potato-producing farmers.

In sum, the grant of exclusive property rights in merely cosmetically refined, well-known varieties of sexually reproduced plants such as potatoes may well eliminate Mr. Cook's company, Four Rivers, and similarly situated potato breeders from pursuing their established businesses and deprive them of their livelihoods. Existing potato farmers are likely to be similarly adversely affected because if PVPA is construed as Petitioner urges, they will not be able to afford the high prices for seed potatoes that certificate owners will thereby be enabled to enforce.



The availability of exclusive rights over cosmetically new varieties of well-known agricultural crops gives mammoth agribusiness enterprises a potentially alarming stranglehold over an important segment of the nation's food supply, allowing them to become unreasonably enriched to the detriment of the plant breeder, the farmer and the public. The Court should not interpret the PVPA in this case so to strengthen such unwarranted monopoly property rights in derogation of the public interest.

#### SUMMARY OF ARGUMENT

The PVPA directs the award of 18-year certificates of exclusivity to the breeders of the sexually reproduced plants it covers, for every novel variety thereof. "Novel variety" is defined to encompass any identifiable difference, however slight, in any characteristic of the plant or its seed.

The PVPA constitutes an unconstitutional exercise of the limited patent power conferred upon Congress in Article I, Section 8, clause 8 of the Constitution because the "novel variety" as defined need not "promote Progress in Science and the useful Arts" as this imperative has been construed in the decisions of this Court.

In addition, the PVPA is not within the power of Congress to enact under the commerce clause. A specific limited power delegated in the Constitution cannot be circumvented or enlarged by reference to some other delegated power couched in ostensibly more general language.

#### ARGUMENT

Amicus presents this brief to bring to this Court's attention a focal issue that has not been raised by the parties—namely, whether the PVPA, authorizing the grant of exclusive private rights covering plant varieties that differ only minutely from known varieties of the same plant, is a constitutional exercise of the legislative power.

Amicus strongly urges the Court to address this issue directly. Recognizing, however, that the Court may feel constrained by the customs of (1) avoiding constitutional questions insofar as possible and (2) confining itself to questions presented by the parties, Amicus further urges the Court, at the least, to avail of the manifest constitutional frailty of the PVPA as demonstrated herein as a basis for limiting the application of that act within the narrowest possible bounds, in accordance with the decision below.

#### I. THE PVPA DOES NOT PROMOTE PROGRESS IN PLANT BREEDING BECAUSE IT REWARDS ATTAINMENT OF ONLY A SCINTILLA OF NOVELTY

The Plant Variety Protection Act ("PVPA"), 7 U.S.C. §§ 2321-2582 (1988) provides for the issuance of patent-like rights—i.e., exclusive privileges limited in time but otherwise essentially limitless within the terms thereof—to those who breed, develop or discover novel varieties of asexually reproduced plants.

The definition of "novel variety" which appears in the PVPA indicates clearly that only the merest scintilla of novelty over a known plant variety is required in order to qualify a cosmetically new variety for the grant of exclusivity. Thus, 7 U.S.C. § 2401(a) (1988) states:

"(a) The term 'novel variety' may be represented by, without limitation, seed, transplants, and plants, and is satisfied if there is:

- (1) Distinctness in the sense that the variety clearly differs by one or more identifiable mor-



phological, physiological or other characteristics (which may include those evidenced by processing or product characteristics, for example, milling and baking characteristics in the case of wheat) as to which a difference in genealogy may contribute evidence, from all prior varieties of public knowledge at the date of determination within the provisions of section 2402 of this title; and

(2) Uniformity in the sense that any variations are describable, predictable and commercially acceptable; and

(3) Stability in the sense that the variety, when sexually reproduced or reconstituted, will remain unchanged with regard to its essential and distinctive characteristics with a reasonable degree of reliability commensurate with that of varieties of the same category in which the same breeding method is employed."

Of the stated criteria, only "distinctness" in any way relates to the necessary quantum of change over prior varieties of the same plant. Careful consideration of what the statute says that distinctness entails clearly reveals that while, e.g., an identifiable improvement in the quality or quantity of the ultimate agricultural product may render a new variety sufficiently "distinct", such a useful improvement over known varieties is *not at all* required. Instead, minute changes in the morphology or physiology of the plant, such as differences in leaf color, leaf shape, size or shape of the mature plant or of the harvested product, seed shape or size and the like—so small as to be recognizable only by professional plant scientists—will qualify the variety for the PVPA certificate imparting an exclusive 18-year privilege to the plant breeder.

Clearly, moreover, the minute change that gives rise to a "novel variety" as defined in the PVPA need have no relationship to any agriculturally, nutritionally or otherwise practically useful characteristic of the plant or

its product. Indeed, even a variety that produces a harvested product of lower nutritional value or one that is less well adapted to grow in certain soils than any known variety currently being cultivated will qualify under the language of the PVPA to receive the certificate of exclusivity, notwithstanding that it possesses no offsetting advantage or benefit.

## II. THE PATENT CLAUSE OF THE CONSTITUTION DOES NOT AUTHORIZE THE PVPA

The constitutional patent clause grants Congress power

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"<sup>1</sup>

In *Graham v. John Deere Co.*, 383 U.S. 1 (1966) this Court held that this power is expressly limited by the terms of the grant, saying

"The clause is both a grant of power and a limitation . . . The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored." 383 U.S. 5-6.

This Court reemphasized in *Anderson's-Black Rock v. Pavement Salvage Co.*, 396 U.S. 56, 61 (1969) and

<sup>1</sup> U.S. Constitution, Art. I, § 8, cl. 8.

*Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 279 (1976) that the Constitution requires a patent law to condition the grant of a valid patent right upon showing a quantum of progress in the useful arts transcending mere novelty.

Importantly, the holding is rooted in the Court's own precedent of more than one hundred years' standing. In *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U.S. 59, 73 (1885) and *Thompson v. Boisselier*, 114 U.S. 1 (1885) the Court opined that the Constitution requires a quantum of addition to useful knowledge that rises above mere novelty as the price for a valid patent. *Thompson* in particular indicates that

"it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the statute, amount to an invention or discovery." [Emphasis added] *Id.* at 11.

The same theme—that a patent-worthy invention or discovery must involve more than trivial, formalistic novelty, something not "within the mental reach of any one skilled in the [relevant] art",<sup>2</sup> "something more than what is obvious to persons skilled in the art to which it relates"<sup>3</sup>—is the dominant theme of this Court's opinions relating to patentability criteria at least from the 1850 date of *Hotchkiss v. Greenwood*, 52 U.S. (11 How.) 248 to the 1976 date of the most recently delivered pronouncement on this topic, *Sakraida v. Ag Pro*, *supra*, this page.

Even before 1850, in one of its earliest opinions touching upon the subject of patents, this Court explained that the patent laws are suffused with a primary public purpose, saying:

"While one great object [of the patent laws] was, by holding out a reasonable reward to inventors and giving them an exclusive right to their inventions for

<sup>2</sup> *Phillips v. Detroit*, 111 U.S. 604, 607 (1884).

<sup>3</sup> *Pearce v. Mulford*, 102 U.S. 112, 118 (1880).

a limited period, to stimulate the efforts of genius; the main object was 'to promote the progress of science and the useful arts' . . . ." [Emphasis Added], *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 18 (1829).

Four years later, in *Shaw v. Cooper*, 32 U.S. (7 Pet.) 292 (1833) this Court explicated that this main object, this public purpose, is not served when patents are granted for only formalistically "new" discoveries, thereby withdrawing from the public a part of what it earlier possessed. The Court said:

"In the progress of society, the range of discoveries in the mechanic arts, in science, and in all things which promote the public convenience, as a matter of course, will be enlarged. This results from the aggregation of mind, and the diversity of talents and pursuits, which exist in every intelligent community. And it would be extremely impolitic to retard or embarrass this advance, by withdrawing from the public any useful invention or art and making it a subject of private monopoly." 32 U.S. (7 Pet.) 320.

In short, the constitutional mandate that patent laws must "promote Progress in Science and useful Arts" not only defines a paramount public purpose<sup>4</sup> but requires that the reward of an exclusive right not be granted to the purveyors of mere trivial variations in old and well known items or techniques, thereby withdrawing those items and techniques, at least in part, from the public. Only recently, Justice O'Connor, speaking for a unanimous Court, so recognized in *Bonito Boats, Inc. v.*

<sup>4</sup> This Court has undeviatingly admonished in many contexts that the public purpose is dominant in the patent and copyright systems. See, e.g., *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972); *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313 (1971); *Lear, Inc. v. Adkins*, 395 U.S. 633 (1969); *Mercoide Corp. v. Mid-Continent Invest. Co.*, 320 U.S. 661 (1944); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917); *Kendall v. Winsor*, 62 U.S. (21 How.) 322 (1858).



*Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). She stated:

"The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and the useful Arts.'" 489 U.S. 146.

The PVPA is an unfortunate and glaring example of legislation that fails to appreciate or respond to the balance reflected by the patent clause. On the face of its "novel variety" definition, *supra*, pp. 5-6, the PVPA encourages and fosters monopolies which stifle competition without any concomitant advance in the progress that the patent clause requires. *It assures that every trifling change* in any of the agricultural plants encompassed will afford its breeder a new exclusive privilege in the form of a certificate conveying an 18-year monopoly.

This Court eloquently summed up the consequences of such a scheme in *Atlantic Works v. Brady*, 107 U.S. 192 (1883) where it contrasted the design of the patent laws to what would clearly result from the automatic grant of a monopoly for every nuance of a new form of an already known product or technique, as follows:

"The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy

tax upon the industry of the country, without contributing anything to the real advancement of the art. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."<sup>5</sup> 107 U.S. 199-200.

Manifestly, PVPA authorizes obstructive, indiscriminate creation of exclusive privileges covering every shadow of a shade of change in an identifiable characteristic of any plant that it covers. The very issues the parties have posed here suggest that the consequences foreseen by this Court in *Atlantic Works* are now being visited upon this country's farmers in derogation of the requisites of the patent clause.

Notably, the PVPA itself tacitly acknowledges doubt existing in the Congress in 1970 when PVPA was first adopted, about whether the patent clause may have been violated. Specifically, 7 U.S.C. § 2581 (1988), which is identical to § 2581 of the original 1970 PVPA, bears the heading "Intent" and provides:

"It is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end, so as to afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties. Constitutional clauses 3 and 8 of article I, section 8 are both relied upon."

<sup>5</sup> Amicus perceives that the PVPA has already resulted in the indiscriminate creation of exclusive privileges over wheat, soybeans and cotton as detailed, e.g., in the Brief Amicus Curiae of the American Seed Trade Association, pp. 10-15. Indeed, the gravamen of that Association's position is that farmers continue to resist the heavy tax that the proliferation of monopoly certificates in the hands of agribusiness is attempting to lay upon them. Amicus fears that the extension of the PVPA to potatoes will subject it to the same uneasy burdens that Respondent here is struggling against.



In 1970 the PVPA was not routed through the subcommittee concerned with patents of the Judiciary Committee of either house of Congress, but was relegated to the Agriculture Committees of both houses.<sup>6</sup>

Clause 3 of Article I, section 8 of the Constitution, is, of course, the commerce clause.

### III. THE IMPERATIVES OF THE CONSTITUTIONAL PATENT CLAUSE CANNOT BE CIRCUMVENTED BY RESORT TO THE COMMERCE CLAUSE

Over the years, proponents of patents for trivially novel subject matter have repeatedly suggested that even if the patent clause of the Constitution does not permit legislation authorizing such patents, the commerce clause surely does so.<sup>7</sup>

The suggestion has manifest logical, legal and historical infirmities. First, of all, if the commerce clause gives the Congress the power to enact patent legislation, the patent clause is *a fortiori* mere surplusage. Secondly, if the commerce clause has an overriding effect upon the patent clause, there has been literally no point to this Court's own numerous carefully crafted interpretations of the patent clause and its overweening public purpose. Thirdly, it may be questioned why the patent clause exists at all.

Pre-constitutional history in England and on the European Continent shows that patents were often utilized there as tools of commerce rather than to foster progress

<sup>6</sup> See in this regard Flynn, *The Orphan Drug Act: An Unconstitutional Exercise of the Patent Power*, 1992 UTAH L. REV. 389, 430, n.119.

<sup>7</sup> See, e.g., *Picard v. United Aircraft Corp.*, 128 F.2d 632, 643 (2d Cir. 1942) (Frank, J., concurring); Posnack, *The Continued Erosion of our Patent System*, 52 J. PAT. OFF. SOC'Y 225 (1970); Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 5 (1966); Lutz, *The Constitution v. the Supreme Court—Re Patents for Inventions*, 13 U. PITT. L. REV. 449 (1952).

in science and useful arts. Thus, in England the earliest grants of patents were intended to encourage introduction into the realm of new trades and industries.<sup>8</sup> England continued to class new techniques and products that had not previously been introduced into the realm as patentable inventions and to denominate the importers as inventors until well after the American Revolution.<sup>9</sup> Considering the state of transportation and communication in the thirteenth to sixteenth centuries and the unlikelihood that imported trades were known in England before their introduction there, it is probable these newly introduced trades did promote some progress in science and useful arts within the realm, but it is nevertheless clear that the primary purpose of these introductions and of the patents that promoted them was to further commerce. Insofar as English practices are concerned, the propensities of various monarchs and even of Parliament to grant commercial monopolies, whether or not they be denominated as patents, is well known in American history. As noted in *Graham v. John Deere Co.*, *supra*, p. 7, it was an English monopoly on tea that sparked the American Revolution.<sup>10</sup>

While it is not clear how well versed the constitutional framers were about the European, including English, experiences with patents as such<sup>11</sup>, it is very clear that they

<sup>8</sup> For example, Prager, *A History of Intellectual Property from 1545 to 1787*, 26 J. PAT. OFF. SOC'Y 711 (1944) relates that in the thirteenth century Edward III granted a patent to Flemish immigrants to encourage them to introduce the technique for manufacturing worsted cloth from wool, then unknown in England, into use within his realm.

<sup>9</sup> Prager, *Standards of Patentable Inventions from 1474 to 1952*, 2 U. CHI. L. REV. 69 (1952); H. Fox, *MONOPOLIES AND PATENTS* (1947).

<sup>10</sup> 383 U.S. 1 at 7.

<sup>11</sup> Jefferson, for example, commented to Isaac McPherson in an 1813 letter that insofar as he knew England was the first country to have a general patent law. 6 WRITINGS OF THOMAS JEFFERSON

shared a distinct aversion to economic monopoly of an arbitrary nature. James Madison, for example, writing in 1792, said:

"That is not a just government, nor is property secure under it where arbitrary restrictions, exemptions and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word, but are the means of acquiring property strictly so called."<sup>12</sup>

A leading American treatise on patents written in the nineteenth century takes the view—which seems self-evident from their antipathy to monopoly generally, their experiences with English commercial monopoly and the very existence of the patent clause as a separate power from that of the commerce clause—that the framers of the Constitution rejected English patent antecedents when they adopted the patent clause. It states:

"When the Constitutional Convention met, its members had before them, there under consideration, the English idea, and a suggestion of a different idea, in the practice of the colonies. The English idea had been to encourage monopolies so that the introduction of a new trade or a new art was the essence of the law. The constitutional idea, however, was that of encouraging domestic invention, and in the first patent law of 1790, and in all subsequent amendments of that law, the basic idea has been to encourage original invention. The introduction of those

180 (Washington Ed. 1814). In fact, however, the Venetian Republic had a general patent statute as early as 1474 which required that only new and ingenious devices could be patented. B. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 22-23 (1967). See also M. FRUMKIN, *THE EARLY HISTORY OF PATENTS FOR INVENTION* 27 (1947).

<sup>12</sup> *THE COMPLETE MADISON* 267-69 (S.K. Padover ed. 1953), quoting *National Gazette*, March 29, 1792.

inventions into use was wisely left to the incentive of business enterprise. The intention was to encourage inventive thought; to secure a disclosure of the inventive thought as promptly as possible."<sup>13</sup>

In short, a conclusion that Congress can enact patent legislation under the commerce clause flies in the face of history as well as logic.<sup>14</sup> In addition, such a conclusion is untenable on strictly legal grounds. It has been a basic rule of constitutional and statutory construction ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) that "*expressio unius est exclusio alterius*"—i.e., "expression of one thing is the exclusion of another".

*Marbury*, rejecting the premise that Congress could use its power to define the appellate jurisdiction of inferior courts as a pretext for amending the Constitution's express delegation of limited original jurisdiction to this Court, points out that:

"If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage—is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

<sup>13</sup> ROBINSON, *PATENTS* (Introduction 11.4-5) (1890).

<sup>14</sup> For a more detailed consideration of the constitutional standard of patentable invention, including its historical underpinnings, see Irons and Sears, *The Constitutional Standard of Invention—The Touchstone for Patent Reform*, 1973 UTAH L. REV. 653.



It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it." 5 U.S. (1 Cranch) 174.

The same rule of construction prompted this Court, in *Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457 (1982) to nullify a special bankruptcy statute not conforming to the "uniformity" mandate of Article I, section 8, clause 4 of the Constitution—and in so doing, to explain that:

"We do not understand either appellant or the United States to argue that Congress may enact bankruptcy laws pursuant to its power under the Commerce Clause. Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause. Thus, if we were to hold that Congress had the power to enact non-uniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." [Citations omitted] 455 U.S. 468-69.

In short, where the Constitution makes an express, limited delegation of power to Congress, as the patent clause does, Congress may not ignore or circumvent the limitation by enacting a nonconforming statute under the cloak of a different delegated power, such as the commerce clause, even if that different power is ostensibly of broader scope.<sup>15</sup>

<sup>15</sup> For a more detailed legal discussion of why the patent power is not encompassed by the commerce power, see Flynn, *The Orphan Drug Act: An Unconstitutional Exercise of the Patent Power*, 1992 UTAH L. REV. 389, especially at 429-442.

## CONCLUSION

The Court is requested to declare the PVPA null and void because beyond the power of Congress, as defined in the Constitution, to enact. Amicus submits that the invalidity of this Act is not only glaring, but so fundamental that it is an effective barrier to fashioning a rational construction of the specific provisions addressed in the briefs of the parties.

Should the Court nevertheless deem that custom and practice prevent it from addressing the PVPA's constitutionality in the circumstance that the parties have failed to raise the issue, Amicus requests the Court to take notice of the manifest infirmity of PVPA by construing the specific section already placed in issue by the parties, i.e., 7 U.S.C. § 2543, within the narrowest possible compass and, accordingly, affirming the decision below.

Respectfully submitted,

MARY HELEN SEARS \*  
THE M. H. SEARS LAW FIRM,  
CHARTERED  
2300 N Street, N.W.  
Sixth Floor  
Washington, D.C. 20037  
(202) 663-9048  
*Counsel for Amicus Curiae*  
Ted Cook

\* Counsel of Record



16  
No. 92-2038

Supreme Court, U.S.  
FILED

AUG 1 1994

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1994

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

BRIEF AMICI CURIAE OF RURAL ADVANCEMENT  
FOUNDATION INTERNATIONAL, FRIENDS OF  
THE EARTH, SEED SAVERS EXCHANGE, NATIVE  
SEEDS/SEARCH, CENTER FOR RURAL AFFAIRS,  
ABUNDANT LIFE SEED FOUNDATION, INSTITUTE  
FOR AGRICULTURE AND TRADE POLICY,  
MINNESOTA SAFE FOOD LINK, PESTICIDE ACTION  
NETWORK NORTH AMERICA REGIONAL CENTER,  
AND WASHINGTON BIOTECHNOLOGY ACTION  
COUNCIL IN SUPPORT OF THE RESPONDENTS

*Of Counsel*

JAMES A. KEMPE  
P.O. Box 385  
Barrington, IL 60011  
(708) 428-1002

DAVID CHARLES MASSELLI \*  
TRACY ANN ROMAN  
MASSELLI & LANE, P.C.  
8260 Greensboro Drive  
Suite 260  
McLean, Virginia 22102  
(703) 556-9550  
*Counsel for Amicus Curiae*

\* Counsel of Record

## QUESTIONS PRESENTED

The Plant Variety Protection Act (PVPA or Act), 7 U.S.C. §§ 2321-2581, generally grants the breeder of a novel variety of a sexually reproduced plant the exclusive right to sell that variety for an 18-year period. The PVPA defines certain actions as infringements on the breeder's rights. 7 U.S.C. § 2541. Those rights are enforceable by a civil action for infringement in the federal district court. 7 U.S.C. § 2561. The PVPA exempts from infringement liability the saving of seed for use in replanting and the sale of saved seed. 7 U.S.C. § 2543. The PVPA also provides that farmers whose primary farming occupation is the growing of crops for other than reproductive purposes may market and sell saved seed to other similarly situated farmers. The Court of Appeals for the Federal Circuit held that sales of saved seed between farmers do not constitute an infringement as long as both the selling and buying farmer utilize at least one-half of their crop from a protected variety for consumption or other nonreproductive purposes. The Court also ruled that the notice provision of 7 U.S.C. § 2541(6) does not apply to sales of saved seed between qualifying farmers. The questions presented are:

1. Whether 7 U.S.C. § 2543 imposes any limitation on the amount of seed a farmer may save or the amount of saved seed which may be sold by a farmer whose primary farming occupation is the growing of crops for sale for other than productive purposes to another farmer?

2. Whether the seed sales authorized by 7 U.S.C. § 2543 remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the purchaser that the seed is a protected variety?

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	v
STATEMENT OF INTEREST OF AMICUS CURIAE..	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
I. THE RIGHT TO SAVE SEED IS EXPRESSED IN CLEAR AND UNAMBIGUOUS TERMS AND IS NOT SUBJECT TO ANY QUALIFI- CATION SUCH AS THAT URGED BY PETI- TIONER .....	7
A. The Right To Save Seed And The Farmer's Exemption Allowing Sales Of Saved Seed Between Farmers Are Not Inconsistent With The Intent And Purposes Of The PVPA .....	11
B. There Is No Statutory Limitation On The Amount Of Seed Which A Qualified Person May Save .....	13
C. There Is No Limitation On The Amount Of Saved Seed Which May Be Sold In A Quali- fying Farmer-To-Farmer Transaction .....	19
II. THE FEDERAL CIRCUIT ERRED IN HOLD- ING THAT ELIGIBILITY FOR A FARMER- TO-FARMER SALE MUST BE DETERMINED ON A CROP-BY-CROP BASIS .....	21
III. THE NOTICE PROVISION OF SECTION 2541 (6) DOES NOT APPLY TO QUALIFYING SALES OF SAVED SEED BETWEEN FARMERS .....	24



## TABLE OF CONTENTS—Continued

IV. THE LIMITATION ON SEED COMPANIES' MONOPOLIZATION OF GENETIC RESOURCES EMBODIED IN THE FARMER'S EXEMPTION IS CONSISTENT WITH PUBLIC POLICY .....	Page 25
CONCLUSION .....	29

## TABLE OF AUTHORITIES

Cases	Page
<i>Asgrow v. Winterboer</i> , 982 F.2d 486 (Fed. Cir. 1992) .....	8, 22
<i>Blue Chip Stamps v. Manor Drug Stores</i> , 421 U.S. 723 (1975) .....	7
<i>Cabell v. Markham</i> , 148 F.2d 737 (2nd Cir.), <i>aff'd</i> , 326 U.S. 404 (1945) .....	17
<i>Consumer Product Safety Commission v. GTE Sylvania</i> , 447 U.S. 102 (1980) .....	11
<i>Federenko v. United States</i> , 449 U.S. 490 (1981) ..	18
<i>Griffin v. Oceanic Contractors, Inc.</i> , 458 U.S. 564 (1982) .....	8
<i>Hallstrom v. Tillamook County</i> , 493 U.S. 20 (1989) .....	9
<i>Kelly v. Robinson</i> , 479 U.S. 36 (1986) .....	11
<i>King v. St. Vincent's Hospital</i> , 112 S. Ct. 570 (1991) .....	16
<i>Landreth Timber Co. v. Landreth</i> , 471 U.S. 681 (1985) .....	7
<i>Mertens v. Hewitt Associates</i> , 113 S. Ct. 2063 (1993) .....	12
<i>Midatlantic National Bank v. New Jersey Department of Environmental Protection</i> , 474 U.S. 494 (1986) .....	11
<i>Moskal v. United States</i> , 498 U.S. 103 (1990) .....	19
<i>Pavelic &amp; LeFlore v. Marvel Entertainment Group</i> , 493 U.S. 120 (1989) .....	13
<i>Public Citizen v. United States Dept. of Justice</i> , 491 U.S. 452 (1989) .....	17
<i>Rodriguez v. United States</i> , 480 U.S. 522 (1987) ....	12, 13
<i>United States v. Nordic Village, Inc.</i> , 112 S. Ct. 1011 (1992) .....	19
<i>United States v. Ron Pair Enterprises, Inc.</i> , 489 U.S. 235 (1989) .....	8, 11
<i>United States v. Turkette</i> , 452 U.S. 576 (1981) .....	11
<i>West Virginia University Hospitals, Inc. v. Casey</i> , 111 S. Ct. 1138 (1991) .....	13
<i>Women Involved In Farm Economics v. U.S.D.A.</i> , 876 F.2d 994 (2nd Cir. 1989) .....	13

## TABLE OF AUTHORITIES—Continued

Federal Statutes	Page
35 U.S.C. §§ 161-164 .....	8, 12
7 U.S.C. § 1551 .....	26
7 U.S.C. § 2321 .....	8
7 U.S.C. § 2401 .....	8
7 U.S.C. § 2483 .....	8, 9
7 U.S.C. § 2541 .....	<i>passim</i>
7 U.S.C. § 2543 .....	<i>passim</i>
7 U.S.C. § 2561 .....	9
7 U.S.C. § 2583 (repealed) .....	12
 International Agreements	
International Convention for the Protection of New Varieties of Plants, March 19, 1991 .....	12
 Other Authorities	
Berkowitz, Kerin and Rudelius, <i>Marketing</i> (2d ed. 1989) .....	17
C. Fowler and P. Mooney, <i>Shattering: Food, Poli- tics and the Loss of Genetic Diversity</i> (1990) ....	27
C. Fowler, <i>Unnatural Selection: Technology, Poli- tics, Law and the Rationalization of Plant Evo- lution</i> , Gordon and Breach Science Publishers, New York (forthcoming) .....	27
H.R. 13631, 91st Cong., 1st Sess. (1969) <i>reprinted in Plant Variety Protection, Hearing on H.R. 13424 etc. Before the Subcomm. on Departmen- tal Operations of the House Comm. on Agricul- ture</i> , 91st Cong., 2d Sess. (1970) .....	12, 17, 22, 23, 29
H.R. Rep. No. 1605, 91st Cong., 2d Sess. (1970) ....	5, 21
<i>Hearings on H.R. 999 Before the Subcomm. on Department Investigations, Oversight and Re- search of the House Comm. on Agriculture</i> , 96th Cong., 2d Sess. ....	26
J. Doyle, <i>Altered Harvest</i> (1985) .....	28
S. Rep. No. 1138, 91st Cong., 2d Sess. (1970) .....	5, 21

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1994

No. 92-2038

ASGROW SEED COMPANY,  
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,  
d/b/a DEEBEES,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit

BRIEF AMICI CURIAE OF RURAL ADVANCEMENT  
FOUNDATION INTERNATIONAL, FRIENDS OF  
THE EARTH, SEED SAVERS EXCHANGE, NATIVE  
SEEDS/SEARCH, CENTER FOR RURAL AFFAIRS,  
ABUNDANT LIFE SEED FOUNDATION, INSTITUTE  
FOR AGRICULTURE AND TRADE POLICY,  
MINNESOTA SAFE FOOD LINK, PESTICIDE ACTION  
NETWORK NORTH AMERICA REGIONAL CENTER,  
AND WASHINGTON BIOTECHNOLOGY ACTION  
COUNCIL IN SUPPORT OF THE RESPONDENTS

The Rural Advancement Foundation International,  
Friends of the Earth, Seed Savers Exchange, Native  
Seeds/SEARCH, Center for Rural Affairs, Abundant Life  
Seed Foundation, Institute for Agriculture and Trade  
Policy, Minnesota Safe Food Link, Pesticide Action Net-



work North America Regional Center, and Washington Biotechnology Action Council respectfully submit this brief as *amici curiae* in support of the Respondents. Consent of the parties has been lodged with the Court.

#### STATEMENT OF INTEREST OF AMICUS CURIAE

The *amici* are public interest and membership organizations with an interest in farm environmental issues. They are particularly concerned about the effect that the increasing regulation of seed germplasm, in this country and abroad, has on maintaining a vital and diverse agricultural sector and about the potential disastrous effects of modifying the system of farmer-based crop development which has been the centerpiece of agriculture in the civilized era.

The Rural Advancement Foundation International-USA ("RAFI") is a private, non-profit organization which is dedicated to the preservation of family farms, the conservation and sustainable use of agricultural biodiversity, and the socially responsible use of new technologies. RAFI is concerned with the loss of genetic diversity in agriculture, and with the impact of plant intellectual property rights on U.S. agriculture and world food security.

Friends of the Earth (FOE) is a national environmental membership group. FOE is an affiliate of Friends of the Earth, International, which is active in fifty-two countries. FOE has pioneered investigations of the effect of biotechnology on the environment and agriculture.

Seed Savers Exchange (SSE) is a non-profit grassroots organization whose 7,000 members are rescuing endangered vegetable and fruit varieties from extinction. SSE's headquarters is at Heritage Farm near Decorah, Iowa, where several unique collections are permanently maintained and displayed, including 13,000 endangered vegetable varieties, 700 old-time apples and 200 hardy grapes.

Native Seeds/SEARCH is a non-profit organization which works to conserve the traditional crops, seeds, and

farming methods that have sustained native peoples throughout the U.S. Southwest and Northwest Mexico. Based in Tucson, Arizona, Native Seeds/SEARCH promotes the use of these ancient crops and their wild relatives by gathering, safeguarding and distributing their seeds, while sharing benefits with traditional communities. Through research, training, and community education, Native Seeds/SEARCH works to protect biodiversity.

The Center for Rural Affairs is an independent, non-profit organization based in Walthill, Nebraska which was formed by rural Nebraskans concerned about the role of public policy in the decline of family farms and rural communities. The Center's purpose is to provoke public thought about social, economic, and environmental issues affecting rural America.

The Abundant Life Seed Foundation is a non-profit corporation organized under the laws of the State of Washington whose purpose is to preserve genetic diversity and sustainable agriculture through acquiring, propagating and preserving native and naturalized seed, with specific emphasis on those species not commercially available, providing information on plant and seed propagation, and aiding in the preservation of native and naturalized plants through cultivation.

The Institute for Agriculture and Trade Policy is a non-profit research and education organization whose mission is to foster economically and environmentally sustainable communities and regions through sound agriculture and trade policy.

Minnesota Safe Food Link is a coalition of farmer and consumer organizations united for safe food and fair farm policies. Through research, public education and community outreach, Minnesota Safe Food Link is working to unite the values and mutual interests that exist between farmers and consumers regarding the issues of food safety and fair family farm policies.



Pesticide Action Network North America Regional Center (PANNA) is a non-profit organization which promotes replacing pesticides with ecologically sound pest management solutions. PANNA defends workers' and consumers' rights to health and environmental quality, and conducts campaigns to expand sustainable agriculture and reduce pesticide use.

The Washington Biotechnology Action Council (WASH-BAC) is composed of Washington state citizens active in environmental, public health, labor, farm and social justice issues. WASH-BAC is devoted to public education and citizen participation in the development of biotechnologies at the local, state, national and international levels.

#### SUMMARY OF ARGUMENT

I. The PVPA imposes no quantitative limit on the amount of seed a person may save from "seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seedling purposes." 7 U.S.C. § 2543. The statute clearly states that such a person may "use such saved seed in the production of a crop on his farm, or for sale as provided in this section." The right to save seed is subject only to the limitations imposed by Sections 2541(3) and 2541(4). Section 2541(3) prohibits sexual multiplication as a step in marketing a protected variety. However, logic dictates that no marketing can exist where the person growing the seed simply saves it. Section 2541(4), although not relevant to this case, prohibits using the seed to produce a hybrid or different variety.

This interpretation squares with the unassailable fact that there are no words of quantitative limitation anywhere in Section 2543. It also reflects the only legislative comment on Section 111 of S. 3070, which was enacted without change as 7 U.S.C. 2543. Both the House and Senate reports accompanying passage of S. 3070 contain identical Section-by-Section Explanations which state that the Section authorizes a farmer "to save seed from

such crop for future use or planting on the farm." H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 12 (1970) (same). Neither report has any statement which, expressly or implicitly, indicates any limitation of the right to save seed, nor any indication that Section 2543 is a "narrow exception."

The right of a farmer to sell seed to another farmer, which is the central issue in this case, is also free from quantitative limitation. All seed which can be saved may also be sold, even though marketing. Section 2543 contains a proviso which removes the restriction on marketing for sales between farmers whose primary farming occupation is the growing of crops for sale for other than nonreproductive purposes. The argument that Section 2541(3) somehow limits the amount of seed which may be saved and therefore limits the amount of seed which may be sold by a farmer who is specifically exempt from Section 2541(3) makes no sense.

II. The Court of Appeals determined that the quantitative limitation on the amount of saved seed of a specific variety which may be sold in a farmer-to-farmer transaction is fifty percent of the crop raised by the selling farmer from the seed of that variety. The statute removes the prohibition against marketing on sales between persons "whose primary farming occupation is the growing of crops for sale for other than nonreproductive purposes." The Federal Circuit determined that this qualification should be read on a crop-by-crop basis. The Federal Circuit's transformation of a test based on "primary farming occupation" to one based on "sells less than half of a specific crop" has no support in the statute.

III. The Federal Circuit was correct in holding that a sale under Section 2543 is exempt from the requirement for notice found in Section 2541(6). Section 2543 specifically exempts sales, including farmer-to-farmer sales, from Section 2541(6). Whatever policy arguments might

support imposition of a notice requirement on "brown bagging" are best addressed to Congress.

IV. Any further limitation on the right to save seed or the right of farmers to sell and exchange saved seed will contribute to the alarming trend of depletion in the genetic germplasm available for growing crops. The vast majority of successful and disease-resistant crops have been, and continue to be, developed in the field and not in seed breeding stations. A flourishing and profitable seed industry existed before the passage of the PVPA, without patent-like protection, and will continue to exist, even if the right to save seed is preserved.

#### ARGUMENT

This case presents a challenge to the right of farmers to save, use and sell seeds harvested from crops they have grown through dint of their toil, at their expense, and on their lands. The right being attacked has existed virtually unfettered since the dawn of civilization. The Right To Save Seed is codified at 7 U.S.C. § 2543, which contains no quantitative limitation of the farmer's right to save and use seed and his or her right to sell and market such seed to other farmers.

The Petitioner, a multinational seed conglomerate whose inventory consists largely of seed patents developed by others, has mounted a vigorous campaign to end the practice known as "brown bagging" in which farmers sell saved seed to other farmers. It is clear that the Petitioner believed it could achieve its goal of stopping such sales simply by forcing farmers engaged in "brown bagging" to endure the costs of litigation. Having lost in the first case contested by a family farmer who chose to do battle, the Petitioner now comes before this Court and asks it to ignore the language of the statute and eviscerate not only the farmer's right to sell seed, but also the right to save seed and use it on one's own farm. The Petitioner's arguments for reading a complex limitation on saving seed into the statute have no merit.

#### I. THE RIGHT TO SAVE SEED IS EXPRESSED IN CLEAR AND UNAMBIGUOUS TERMS AND IS NOT SUBJECT TO ANY QUALIFICATION SUCH AS THAT URGED BY PETITIONER

Viewing the PVPA through the prism of self-interest, which it equates with the "purpose" of the statute, Petitioner argues that the language of the statute should give way to an interpretation based on what Petitioner wished the statute said. However impassioned the argument of Petitioner and its trade association *amici*, the Court should resist Petitioner's proposed rewrite of the statute under the guise of statutory interpretation. Resort to the form of statutory construction urged here would render the legislative process meaningless. Statutes are the product of compromise and the tug and pull of competing interests. While Congress may espouse numerous lofty and laudable goals—the elimination of poverty and disease, the advancement of science, protection of the environment and the like—it enacts specific provisions, not goals.<sup>1</sup> No bill ever states "This is a modestly important matter to which we have devoted some attention and while we want to achieve certain goals, we are not prepared to do much to reach them." But this is exactly what much, if not most, legislation does.

In resolving a dispute over the meaning of a statute "[i]t is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) quoting *Blue Chip Stamps v. Manor Drug Stores*,

<sup>1</sup> The much-awaited Man from Mars, reading legislative preambles and committee reports, might be puzzled to learn that the fostering of a domestic bee-keeping industry, the preservation of helium supplies, and the naming of weeks and months in honor of vegetables and obscure local politicians bear the same importance as national defense or finding a cure for cancer. What he would make of the many legislative encomiums to reducing the deficit which are attached to appropriations measures manifestly increasing it is open to question.



421 U.S. 723, 756 (1975) (POWELL, J., concurring). And if the language of the statute is clear, this is "where the inquiry should end." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). The plain language should always govern, except in "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). There is no such conflict in this case; even giving full effect to the farmer's right to sell saved seed, the statute promotes the seed breeding industry and limits the effects of farmer sales.<sup>2</sup>

The Plant Variety Protection Act of 1970, 7 U.S.C. §§ 2321 *et seq.*, establishes certain protections for a plant breeder who develops a novel variety of a sexually reproduced plant<sup>3</sup> and receives a certificate of protection from the Plant Variety Protection Office of the Department of Agriculture. 7 U.S.C. § 2483. A certificate of plant variety protection covers "seeds, transplants, and plants" of the novel variety. 7 U.S.C. § 2401(a).

Only two sections of the PVPA are relevant to the present dispute. Section 111 of the Act, 7 U.S.C. § 2541, PL 91-577, Title III, § 111, December 24, 1970, 84 Stat. 1554, establishes protection of the rights given to proprietors of a certificate of plant variety protection by defining eight acts of infringement: (1) selling the protected variety; (2) importing or exporting the protected variety;

<sup>2</sup> As the Federal Circuit noted below, a number of important restrictions remain on saved seed which has been sold by a farmer pursuant to 7 U.S.C. 2543. The most important of these is that the farmer who buys the seed can neither save nor sell it. *Asgrow v. Winterboer*, 982 F.2d 486, 490 (Fed. Cir. 1992).

<sup>3</sup> Sexually reproduced plants are those produced from seed. 7 U.S.C. § 2401(f). Plants reproduced by asexual methods, such as grafting, budding or cutting, are provided patent protection under U.S. patent law by the Plant Patent Act, 35 U.S.C. §§ 161-164, Act of May 23, 1930, ch. 312, 46 Stat. 376.

(3) sexually multiplying the protected variety as a step in marketing it for growing purposes; (4) using the protected variety to produce a hybrid; (5) using seed which has been labelled "propagation prohibited" to produce the protected variety; (6) dispensing the protected variety without notice that it is a protected variety; (7) performing any of the former in which the protected variety is multiplied asexually; and (8) inducing any of the former. The "patent-like" protection given to holders of certificates of plant variety protection issued pursuant to 7 U.S.C. § 2483 consists of the ability to bring an infringement action under 7 U.S.C. § 2561.

Almost immediately following Section 111 is Section 113, 7 U.S.C. § 2543, which establishes both the right to save seed and the crop exemption.<sup>4</sup> Section 113, PL 91-577, Title III, § 113, December 24, 1970, 84 Stat. 1555:

§ 2543. Right to save seed; crop exemption

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of Section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop on his farm, or for sale as provided in this section: *Provided*, That without regard to the provision of Section 2541(3) of this title, it shall

<sup>4</sup> Because 7 U.S.C. § 2543 establishes, even according to the Petitioner, some sort of exemption to the infringement provisions of 7 U.S.C. § 2541, cases such as *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), cited by Petitioner are of questionable relevance. *Hallstrom* involved an attempt to create an exception to a statutory provision where the statute "contains no exception applicable to petitioner's situation." *Id.* at 27. Here, there is no attempt to create, by implication, an exemption to the statute construed. Rather, the task is to determine the contours of an exemption whose existence is conceded by all.



not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than nonreproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale be in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.

The Federal Circuit held that Section 2543 placed no quantitative limitation on the right of farmers to save seed. It interpreted the statutory limitation on sale of seed on a crop-by-crop basis. Petitioner argues that the right to save seed is limited to the amount of seed needed to plant the next year's crop, and that the right to sell seed is similarly limited to the amount which can be saved.

Neither of these approaches is correct, although that of the Federal Circuit is far closer to the mark. The right to save seed is not limited by the statute. The right of a farmer to market seed for reproductive purposes is limited, as stated in the statute, to transactions between farmers whose primary farming occupation is the growing of crops for sale for other than reproductive purposes. The crop-by-crop limitation has no basis in law: the eligibility of both the farmer-seller and a farmer-buyer is based on whether, taken as a whole, they are in the business of selling crops or the business of selling seed.

#### **A. The Right To Save Seed And The Farmer's Exemption Allowing Sales Of Saved Seed Between Farmers Are Not Inconsistent With The Intent And Purposes Of The PVPA**

The Petitioner asks this Court to enter the legislative thicket and gut the farmer's exemption by arguing that a "proper reading" will "avoid attributing absurd results to Congress." Petitioner's Br. at 17. Petitioner then asks the Court to insert, into a section designed to benefit farmers, a lengthy and complex quantitative limitation on the right to save seed which does not appear in either the language of the Act or its legislative history. As this Court has stated, "[i]f the statutory language is unambiguous, in the absence of 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *U.S. v. Turkette*, 452 U.S. 576, 581 (1981) quoting *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

Cases in which the Court exercises the extraordinary method of statutory construction urged by the Petitioner are rare. In *Ron Pair*, the Court analyzed two instances in which it had effectively utilized such construction to invalidate the statutory language by importing a lengthy gloss, *Midatlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986) and *Kelly v. Robinson*, 479 U.S. 36 (1986). The Court noted that these cases had certain significant similarities:

Both decisions concerned statutory language which, at least to some degree, was open to interpretation. Each involved a situation where bankruptcy law, under the proposed interpretation, was in conflict with state or federal laws of great importance.

*Ron Pair*, 489 U.S. at 245. No such conflict with other law is present here.

By ceaseless repetition, Petitioner and the *amici* hope to convince this Court that the language of Section 2543,

which provides the right to save and sell seed without quantitative limitations, is inconsistent with the purposes of the Act unless a quantitative limitation is added or otherwise read into that language. As this Court has recently stated, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." *Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2071 (1993). While the construction of Section 2543 urged by Petitioner might further the ultimate policy objectives of PVPA, as viewed by the Petitioner, this fact does not justify incorporation of that policy into law over inconsistent statutory language. "No legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

The evidence is overwhelming that Congress did not intend to pursue the goals of the plant breeding industry at all costs. Congress refused to extend to the breeders of sexually reproduced plants the patent protection afforded breeders of asexually reproduced plants by the Plant Patent Act, codified at 35 U.S.C. §§ 161-164. When the PVPA was initially passed, it excluded from coverage six of the most popular and, presumably, most profitable species. 7 U.S.C. § 2583 (repealed). Congress also failed to enact the language contained in Section 112 of H.R. 13631, which would have expressly limited the farmer's right to save seed to the amount needed to grow crops for his or her own use, and which would have substituted the language now found in the statute. Lastly, although the United States became a signatory on March 19, 1991, the Senate has thus far refused to ratify the International Convention for the Protection of New Varieties of Plants (UPOV), which would limit the right to save seed along the lines urged by the Petitioner.

As will be discussed at some length in Section IV, *infra*, the saving of seed and the swapping, sale or transfer of seed between farmers has been an integral part of our

agricultural development. Early drafts of the PVPA would have eliminated this right totally; the final legislation did not. This fact is an essential component of any determination of legislative intent: "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991). The PVPA attempts to balance the rights of breeders with those of farmers, other growers of plants, and consumers. The balance should not be altered based on assertions of legislative intent, as "deciding what competing values will or will not be sacrificed through achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526.

Whatever the Court or the litigants may think about the wisdom of extending or contracting the farmer's exemption is beside the point; the purpose of judicial review of statutory meaning is to "apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). Any examination of legislative intent must not fall into an artificial examination of only the purported overall purpose of the statute, without giving proper deference to the purpose of the specific provision which is being interpreted. *Women Involved In Farm Economics v. U.S.D.A.*, 876 F.2d 994, 1002 (2nd Cir. 1989).

#### **B. There Is No Statutory Limitation On The Amount Of Seed Which A Qualified Person May Save**

The first sentence of Section 2543 consists of two parts, an opening clause followed by a proviso, each of which provides exemptions from liability for infringement under 7 U.S.C. § 2541. The opening clause gives a person who has produced seed from seed lawfully purchased



from a certificate holder (or descended from such seed) exemptions from all subsections of Section 2541, except for subsections (3) and (4):

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of Section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop on his farm, or for sale as provided in this section . . .

7 U.S.C. § 2543. This language is the source of the right to save seed.

While perhaps ungainly, the opening clause is not ambiguous. None of the prohibitions of Section 2541, except for subsections (3) and (4), apply to any person, whether a farmer, a suburban gardener, or an agribusiness conglomerate, who (1) has bought seed from the owner of the variety; (2) has produced new seed from a crop grown by him from the seed obtained from the certificate holder or descended from seed obtained from the certificate holder; and (3) is saving the produced seed. That person may do two things with the saved seed: "use such saved seed in the production of a crop on his farm" or "use such saved seed . . . for sale as provided in this section." These rights—to use seed on the farm or to sell it—are subject only to subsections (3) and (4) of Section 2541. Thus, the grower can save seed so long as he or she is not violating Section 2541(3) or (4). Subsection (3) prohibits sexual multiplication as a step in marketing, while subsection (4) prohibits use of the protected variety in producing a hybrid. Neither subsection places any quantitative limit on the amount of seed which may be saved. Nor, interestingly, do they place any limit on the amount of seed which may be sold, except that

marketing remains prohibited because Section 2541(3) applies to sales of saved seed.<sup>6</sup>

In contrast to this straightforward reading of the opening clause of Section 2543, Petitioner finds hidden and precise meanings submerged in its depths. Petitioner argues that placing an emphasis on the words "[e]xcept to the extent that such action may constitute an infringement under subsection (3) and (4) of section 2541 of this title" makes it "clear that the amount of PVPA seed that can be saved and sold as seed by the farmer is limited to precisely what Asgrow contends Congress provided in the statute." Petitioner's Br. at 19. The Petitioner goes on to state that the infringement provision of Section 2541(3) provides a "specific quantitative limit on the amount of PVPA seed that can be sold" which is "the portion of the farmer's crop which was sexually multiplied not as a step in marketing the novel variety, but

<sup>6</sup> The term "marketing" found in Section 2541(3) is not defined in the PVPA. Its definition is not necessary for the resolution of this case because the Winterboers were engaging in a farmer-to-farmer sale, to which the prohibition on marketing does not apply.

However, it is obvious that by lifting the prohibition on sales in the opening clause while retaining the prohibition on marketing, Congress must have intended that certain types of sales did not constitute marketing and that such sales would be allowed, even if not between farmers whose primary farming occupation is the growing of crops for sale for other than reproductive purposes.

An example of the kind of sale or transfer which might be allowed under the opening clause, even subject to the limitation of Section 2541(3), would be the transfer of saved seed incident to the sale of a farm. Other sales or transfers which do not involve marketing include: transfer on inheritance, foreclosure, and transfer to a trustee in bankruptcy. Sales of saved seed by ranchers, dairy farmers and others whose primary farming occupation is not the growing of crops might also be allowed, as long as it was not accompanied by marketing.



only for future use as seed on the farmer's own farm." Petitioner's Br. at 21.<sup>6</sup>

The flaw in this approach<sup>7</sup> is that Section 2541(3) can not operate to place any limitation on "saving seed." The farmer may save whatever amount of seed he or she wishes for use on his farm—for more than one year, or for more acreage (either by choosing to plant more on existing land or acquiring additional land)—without violating Section 2541(3), because he is not "marketing" the product by saving it.

The dispute which both the Petitioner and the United States have with the Federal Circuit over whether "marketing" and "sales" are distinct or overlapping has no relevance to saving seed. Nevertheless, the assertion that "sales" equal "marketing" seems to fly in the face of the statute itself, which establishes separate prohibitions on the selling of a protected variety, Section 2541(1), and the marketing of a protected variety, Section 2541(3). While both the Petitioner and the United States resort to dictionaries to argue for the broadest possible interpretation of "marketing" as including "sale,"<sup>8</sup> none of the

<sup>6</sup> The United States adds an interesting gloss on this by stating that "[s]ection 2543 permits a farmer who has originally set aside seed for replanting, but who no longer needs the seed because of a change in his or her planting plans, to sell it for use as a seed." United States' Br. at 11. While perhaps an interesting plot for a farm docudrama, there is not one single word in the statute or the legislative history which hints that the right to sell is limited to circumstances where there has been a change in plans. Even Petitioner concedes that a farmer could sell each year the amount it takes to replant his own crop for whatever reason.

<sup>7</sup> Petitioner's analysis of the statute is reminiscent of the sort of "structural analysis . . . discerning a significant hierarchy of . . . rights in the statutory scheme" which was rejected, in favor of a literal reading, by the Court in *King v. St. Vincent's Hospital*, 112 S. Ct. 570, 573 (1991).

<sup>8</sup> Petitioner's Br. at 21 n.14; United States' Br. at 12 n.9. We should be mindful of the command "not to make a fortress of the

definitions they cite have any application to the saving of seed. All of the definitions of marketing relied on by Petitioner and the United States require buying or selling in a market, or the totality of activities involved in the transfer of goods from producer or seller to consumer or buyer. There is no buying or selling, or transfer of goods, when a farmer saves seed. Thus any amount of seed may be saved without running afoul of Section 2541(3), even accepting the definitions put forth by Petitioner and the United States.

It is noteworthy that an earlier version of the statute did limit the amount of seed which could be saved to that which could be grown for use by the farmer. The House Bill, H.R. 13631, contained a Section 112 which read as follows:

#### Section 112. Right to Save Seed

Except under subsections (3) and (4) of Section 111, it shall not infringe any right hereunder for a person to save seed and grow the resulting variety for his own use.

H.R. Rep. No. 13631, 91st Cong., 1st Sess. 102-03 (1969) reprinted in *Plant Variety Protection*, Hearing on H.R. 13424, etc. Before the Subcomm. on Departmental Operations of the House Comm. on Agriculture, 91st Cong., 2d Sess. (1970). That Section, which provides the limitations Petitioner now seeks, was not adopted and

dictionary." *Public Citizen v. U.S. Depart. of Justice*, 491 U.S. 452, 455 (1989), citing *Cabell v. Markham*, 148 F.2d 737, 739 (2nd Cir.), *aff'd*, 326 U.S. 404 (1945). There is no reason to believe that the particular nonlegislative sources chosen by these litigants are dispositive concerning the definition of marketing. A standard textbook in the area cites with approval the definition of marketing adopted by the American Marketing Association: "marketing is the process of planning and executing the conception, pricing, promotion, and distribution of ideas, goods, and services to create exchanges that satisfy individual and organizational objectives." Berkowitz, Kerin and Rudelius, *Marketing* 7 (2d ed. 1989).

should not now be engrafted onto the statute through some marvel of statutory construction.<sup>9</sup>

The proposed limitations on the farmer's right to save seed must fail because keeping and storing sexually multiplied seed does not constitute marketing. Section 2541(3) is only relevant when there is sexual multiplication of the protected seed in the context of marketing. Thus, if not limited by Section 2541(3), there can be no other limitation on the amount of seed which a farmer may save.<sup>10</sup> The contention that Section 2541(3) limits the saving of seed is the centerpiece of the arguments advanced by Petitioner and the United States, as *amicus curiae*. Once the essential fallacy of this proposition is recognized, there is no reason to engage in the fanciful and often tortured readings which are made of the statute.

A plain language reading does not render any portion of the statute superfluous. The retention of Section 2541(3) in the opening clause of Section 2543 does not limit the amount of seed which can be saved, but rather denies the grower of protected seed an unfettered right to sell, through marketing, protected varieties. That right would otherwise exist due to the exemption from Section 2541(1), the prohibition on selling, which is provided in the

<sup>9</sup> The fact that a provision incorporating the limitation advanced by Petitioner could easily have been written, was before Congress during the consideration of the legislation, and was not enacted is powerful evidence that Congress intended that there be no such limitation. *Federenko v. United States*, 449 U.S. 490, 512 (1981). As the Court said in a slightly different context in that case, it appears that the "real quarrel is with Congress, which drafted the statute. It is not the function of the courts to amend statutes under the guise of 'statutory construction.'" *Id.* at 514 n.35.

<sup>10</sup> The United States does concede that seed saving need not be limited to the amount of seed necessary to produce a crop of the same size in the immediately ensuing crop season. *United States*, Br. at 16 n.14. It notes that farmers often change the amount they plant from year-to-year and also that, as a matter of practice, farmers will set aside more than one year's supply of seed.

opening clause.<sup>11</sup> This right to sell *and* market is granted by language of the proviso only to qualified farmers, like the Winterboers. This reading of the opening clause comports with that canon of statutory construction which sets forth the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *U.S. v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992); *accord*, *Moskal v. United States*, 498 U.S. 103, 109-10 (1990).

#### C. There Is No Limitation On The Amount Of Saved Seed Which May Be Sold In A Qualifying Farmer-To-Farmer Transaction

The proviso found in Section 2543 removes the limitation on sales to other farmers which Section 2541(3)—the prohibition on sexually multiplying the protected variety as a step in marketing—would otherwise impose:

*Provided*, That without regard to the provision of Section 2541(3) of this title, it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than nonreproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale be in compliance with such State laws governing the sale of seed as may be applicable.

<sup>11</sup> It was necessary to provide an exemption from Section 2541(1) to allow the farmer-grower who had legally purchased the protected variety to do anything with the crop, as Section 2541(1) makes it an infringement to sell, offer, expose for sale, deliver, ship, consign, exchange, solicit an offer to buy or otherwise transfer title or possession of the protected variety. For many plants such as soybeans the seed is the crop. The retention of liability for infringement under Section 2541(3), which prohibits multiplication for marketing for growing purposes (rather than consumption), preserves those elements of Section 2541(1) which prohibit sales involving intensive marketing. The opening clause, by exempting "a person" from infringement liability to "use such saved seed . . . for sale as provided in this Section," allows such sales as do not involve marketing. Sales involving marketing are only allowed



7 U.S.C. § 2543. In a farmer-to-farmer sale the limitation on sexually multiplying the variety as part of *marketing* no longer applies. Nor does 7 U.S.C. § 2541(6), the limitation on reselling the variety without giving notice, apply. See Section III, *infra*. Thus, the farmer can produce the seed by sexual multiplication, sell it to another farmer, and need not give notice. The only limitation on such sale is that both the seller and the buyer be persons "whose primary farming occupation is the growing of crops for sale for other than nonreproductive purposes."

The Petitioner would read the statute as follows: in the first part of Section 2543, the retention of the Section 2541(3) prohibition limits the amount which the farmer can save to some precisely determinable limit related to replanting, and the proviso allows sales of only that amount. Petitioner's Br. at 25. As discussed at some length, *supra*, Section 2541(3) does not place any quantitative bound on the amount of seed which may be saved.

The Section-by-Section Explanation of S. 3070 in both the House and Senate reports accompanying passage provides strong evidence that the drafters intended no limitations on saving seed, nor any resultant limitation on "brown bagging." Interpreting the exact language enacted into statute as Section 2543, the explanation of Section 113 of S. 3070 states:

Section 113. Right to Save Seed, Crop Exemption.— This section authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; to save seed from such crop for future use or planting on the farm; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed for reproductive purposes to other persons so engaged.

between qualifying farmers. Any other construction would render the right to sell afforded by the opening clause a nullity.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970). S. Rep. No. 1138, 91st Cong., 2d Sess. 12 (1970) (same). No other section of the House or Senate reports addresses Section 113 of S. 3070.

The Explanation contains no suggestion of any limitation on the right to save seed. The right to save seed is "for future use *or* planting on the farm."<sup>12</sup> [Emphasis added] The disjunctive combination of "future use" and "planting" can only mean that the farmer may save seed for purposes other than planting on the farm. The report language is totally inconsistent with an interpretation which limits the right to save seed to the amount needed to plant the next year's crop. The right to sell "such saved seed" is similarly unfettered. The right can be availed of by any farmer whose "primary farming occupation is the growing of crops for other than reproductive purposes," so long as the saved seed is sold to another farmer similarly defined.

In summary, the right to market and sell saved seed in a farmer-to-farmer transaction is not subject to any quantitative limitation, except insofar as one is provided by the language in the proviso which limits the exemption from Section 2541(3) to persons "whose primary farming occupation is the growing of crops for other than reproductive purposes."

## II. THE FEDERAL CIRCUIT ERRED IN HOLDING THAT ELIGIBILITY FOR A FARMER-TO-FARMER SALE MUST BE DETERMINED ON A CROP-BY-CROP BASIS

The PVPA does not provide a license for unlimited "brown bagging." The Federal Circuit correctly determined that the limitation did not come from restrictions on the right of the farmer to save seed. It further correctly determined that the language in the proviso allowing

<sup>12</sup> It should be noted that neither "future use" nor "planting on the farm" is limited to what is needed for the next year's crop.

farmer-to-farmer sales only for farmers "whose primary farming occupation is the growing of crops for other than reproductive purposes" does limit the amount of "brown bagging" in which a farmer may engage.

However, the Court erred when it employed a test which examined the percentage of each novel variety a farmer was selling for seed, rather than looking to whether the farmer was predominately in the business of raising crops or selling seed:

Indeed, the title of section 2543 is "crop exemption," not primary farming exemption. This title and the context of the Act show that the PVPA applies this crop exemption on a crop-by-crop basis (i.e. on "crops produced from a particular novel seed variety-by-crops produced from a particular novel seed variety" basis). The phrase "primary farming occupation is the growing of crops" applied to crops produced from a particular novel variety. Thus, buyers and sellers of brown bag seed qualify for the crop exemption only if they produce a larger crop from the protected seed for consumption (or other nonreproductive purposes) than for sale as seed.

*Asgrow v. Winterboer*, 982 F.2d 486, 490 (Fed. Cir. 1992).

The Federal Circuit court erred in holding that because Section 2543 is entitled "crop exemption" the primary farming occupation test must be applied on a crop-by-crop basis. Section 2543 covers two separate, though related, areas: the saving and sale of seed for growing purposes and the sale of seed as a crop. "Crop exemption" does not apply to sales of seed for reproductive purposes, but to the sale of seed as a crop. It was derived from Section 114 of H.R. 13631:

#### Sec. 114. Crop Exemption

It shall not be an infringement to sell seed grown from the protected variety, obtained (for growing) by authority of the proprietor or by saving seed under section 112, for use as food, feed, in manufacture or

the like, if the sale is bona fide for that purpose, and is in channels which are usual for that purpose and in a manner exclusively for that purpose.

H.R. Rep. No. 13631, 91st Cong., 1st Sess. 102-03 (1969). This language, almost in the original form, is reproduced in Section 2543 subsequent to the language dealing with farmer-to-farmer sales. The provision regarding "crop exemption" was intended to deal with the situation where the seed was the crop, as with soybeans, not with the sale of seeds for reproduction. Because these seeds would not be sold in a farmer-to-farmer transaction, the marketing of such seeds would otherwise constitute an infringement. Section 112, as dramatically amended, and Section 114 of H.R. 13631 were combined in Section 113 of S. 3070 and both titles were combined in the caption. The resultant "crop exemption" refers only to sales of seed for nonreproductive purposes, which have no limit so long as they are made in the usual channels.

Sales of saved seed for reproductive purposes are not limited by a "crop exemption," but instead by the requirement that they be made between qualifying farmers meeting the "primary farming occupation" test. The use of the words "occupation" and "crops" in the statutory definition of that test is inconsistent with the crop-by-crop determination of status adopted by the Federal Circuit. It also comports with common sense to base eligibility on one's overall involvement with raising crops, rather than a specific crop. Neither a selling farmer nor a buying farmer is likely to know the crop-by-crop status of the other. They are far more likely to know whether, on the whole, the farmer they are dealing with is in the business of selling crops or selling seeds. Farmer-to-farmer sales of saved seed are permissible, as long as neither the selling farmer nor the buyer is in the seed business, but primarily makes his or her farming income from the sale of crops for consumption.



### III. THE NOTICE PROVISION OF SECTION 2541(6) DOES NOT APPLY TO QUALIFYING SALES OF SAVED SEED BETWEEN FARMERS

The Court also granted certiorari on a second question involving the PVPA: whether those sales which are authorized under the farmer's exemption remain subject to Section 2541(6), which provides that it is an infringement of the rights of the owner of a protected variety to "dispense the novel variety, in a form which can be propagated, without notice as to being a protected variety under which it was received." 7 U.S.C. § 2541(6).

A cursory reading of the statute disposes of this matter. The opening clause of Section 2543 states that it does not infringe any right, other than those provided by Sections 2541(3) and (4), to save seed or sell saved seed. If the words of the opening clause are given their usual and ordinary meaning, Section 2541(6) does not, and can not, apply to the farmer's saving of seed or to the sale of saved seed to a qualified farmer. The United States, as *amicus curiae*, grudgingly reached this conclusion.

Petitioner argues that the proviso which adds yet another exemption to those already granted—the exemption from Section 2541(3) for farmer-to-farmer sales—somehow reinstates the applicability of Section 2541(6) and other exemptions granted in the opening clause.<sup>13</sup> Petitioner's Br. at 33-34. According to the Petitioner, one begins with the blanket statement in the opening clause of Section 2543 that "[e]xcept to the extent that such action may constitute an infringement under subsection (3) and (4) to Section 2541, it shall not infringe *any* right hereunder for a person to save seed . . . for sale," [emphasis added] which appears to exempt activity by

<sup>13</sup> In fact, Petitioner goes further and argues that "the other non-sale" acts listed in subsection (1) and all of the acts covered by subsections (2), (5), (7) and (8) of Section 2541 should remain applicable to sales under Section 2543. Petitioner's Br. at 33-34.

persons covered by Section 2543 from six of the eight subsections of Section 2541, then adds the specific proviso that farmer-to-farmer sales (a subset of sales enjoying that blanket freedom from other infringing acts) are additionally free from subsection (3) of Section 2541, a seventh subsection, and somehow ends up with the statutory reading that farmer-to-farmer sales are subject to subsections (1), (2), (4), (5), (6), (7) and (8) of Section 2541.<sup>14</sup> This "new math," by which six exemptions in the opening clause and an additional exemption from Section 2541(3) in the proviso add up to one exemption, rather than seven exemptions, is absurd. Whatever sales of saved seed are permitted by Section 2543 are also free from the notice requirement otherwise imposed by Section 2541(6).

### IV. THE LIMITATION ON SEED COMPANIES' MONOPOLIZATION OF GENETIC RESOURCES EMBODIED IN THE FARMER'S EXEMPTION IS CONSISTENT WITH PUBLIC POLICY

Stripped of their meager legal support, the arguments of Petitioner and the *amici* bottom on policy considerations. The statute that Congress ought to have written, according to those urging reversal, should dramatically limit both saving seed and selling it to other farmers. While there is undoubtedly some merit in encouraging the development of new varieties of seed by offering to seed developers a patent-like protection, one can easily over-

<sup>14</sup> Petitioner states that "[t]he first sentence of Section 2543 can only properly be construed as providing a limited exemption from infringement solely with respect to those portions of Section 2541 that protect the specific "action" later exempted: certain sales of a protected variety that would otherwise be infringements under subsections (1) and (3) of Section 2541." Petitioner's Br. at 32. However, Petitioner fails to explain why, if Congress intended only to exempt growers of seed from subsection (1) of Section 2541 in the first sentence of Section 2543, it used the phrase "it shall not infringe any right" and provided six exemptions, not just an exemption from Section 2541(1).

state the importance of seed patents in achieving the goal of a healthy agricultural sector. This country did, after all, develop a robust and variegated agriculture and foster the "Green Revolution," the development of high-yielding wheat and rice varieties in the 1960s and 1970s that dramatically increased food production in the Third World, without a single seed patent.<sup>15</sup> The role of patent-holding seed breeders in achieving this diversity is minimal.<sup>16</sup>

Plant varieties are distinct from other kinds of "inventions" because no plant breeder starts from scratch in developing a new variety. Modern plant breeders, both public and private, build on the accumulated success and innovation of generations of farmers and breeders. Historically, U.S. farmers played a major role in contributing to the introduction and further development of exotic germplasm. America's farmers undertook countless "experiments" and, through mass selection, developed literally tens of thousands of novel plant varieties. It was the farmers' success in selecting and breeding these crops that helped to build the agricultural base of the United States. Farmer-bred and selected varieties became the backbone

<sup>15</sup> Patents were available for asexually reproducing plants, which consist almost entirely of fruits and ornamental cultivars under the Plant Patent Act. Most grains and vegetables are sexually reproducing.

<sup>16</sup> *Hearings on H.R. 999 Before the Subcomm. on Department Investigations, Oversight and Research of the House Comm. on Agriculture*, 96th Cong., 2d Sess. 140 (Testimony of Kenneth Dahlberg). Dahlberg testified that 90% of all plant breeding has been done by nature itself and 9.9% by subsistence farmers.

It is important to recall that the seed breeding industry was not a product of the PVPA. Hundreds of seed breeders ran substantial businesses for more than a century prior to the PVPA. Companies such as Burpee, Pioneer and DeKalb were household names, active in every farm community, without patent protection. The importance of assuring uniform quality in farm seeds led, in 1912, to passage of the Federal Seed Law, which was replaced in 1939 by the Federal Seed Act, 7 U.S.C. §§ 1551 *et seq.*

of and raw material for the emergence of public and eventually private plant breeding programs.<sup>17</sup>

Advances in science and plant breeding techniques have cast a new light and a new value on genes. "Genetic erosion," the loss of genetic diversity through extinction, is an unintended consequence of modern plant breeding. To the extent that a breeder produces a successful variety, it can displace genetic material needed for future breeding programs. The loss of genetic diversity means the loss of valuable genes vital to a crop's ability to resist pests and diseases.<sup>18</sup> This transformation of a once abundant resource into a rare one raises the issue of how to guarantee access to the shrinking resource of genetic material, as well as the issue of who has the right to exercise control over this resource.

Seed saving and the swapping and selling of seeds between farmers make an important contribution to ensuring a diverse and robust gene pool for important crops. The construction of the PVPA sought by Petitioner will have a chilling effect on these practices. If farmers believe that saving or selling more than some unquantifiable amount of seed will subject them to infringement suits by multinational seed conglomerates, they are likely to cease the practice altogether.

Even with the farmer's exemption, the PVPA has resulted in tremendous consolidation within the seed industry with a resultant loss of options regarding not only genetic diversity but also farmers' choice. Whatever the causal link, there have been a large number of mergers and acquisitions in the U.S. seed industry since the pas-

<sup>17</sup> C. Fowler, *Unnatural Selection: Technology, Politics, Law and the Rationalization of Plant Evolution*, Gordon and Breach Science Publishers, New York (forthcoming).

<sup>18</sup> C. Fowler and P. Mooney, *Shattering: Food, Politics and the Loss of Genetic Diversity* 82 (1990).



sage of PVPA.<sup>19</sup> Transnational pharmaceutical and agrochemical companies bought up hundreds of regional and family-owned seed companies. During the 1970s and 1980s, more than 500 family-owned seed firms were bought out by transnational corporations worldwide. The rise of the large corporate sector in controlling research and development for the future of agriculture has been accompanied by a precipitous decline in the public sector's role in this field. As a result, many old varieties have disappeared forever, displaced in the seed catalogues by a limited selection of new varieties sold as a package with herbicides and fertilizers. Adoption of the severe limitation on the farmer's exemption sought by Asgrow would exacerbate these disturbing trends.

Not only has the PVPA resulted in a loss of genetic diversity, but it has also resulted in a loss of farmers' choice, a loss which would be exacerbated if Asgrow's narrowing of the farmer's exemption is adopted. Because food production is an economic field vital to human survival, this loss of choice not only affects farmers but society as a whole. The PVPA has resulted in farmers having fewer choices of seed to select from, and having to pay significantly higher prices for those seeds that are available. Asgrow's proffered narrowing of the farmer's exemption would enable the seed industry to dictate to farmers how they dispose of their harvest.

Should farmers lose the right to save, swap or sell proprietary seed with farmer neighbors, they will have no choice but to return year after year to the seed companies for seed. Farmers would essentially become mere renters of germplasm, which would create, in effect, a new form of sharecropping. Concomitantly, adoption of Asgrow's narrow interpretation of the farmer's exemption would also foster greater concentration in the ownership and control of germplasm by transnational seed and agrochemical corporations. Not only would this entail an

<sup>19</sup> J. Doyle, *Altered Harvest* 432-76 (1985).

increase in the cost of seed to farmers,<sup>20</sup> but it would also entail surrender of the farmers' ability to decide what crops they wish to plant. The farmer's exemption acts as a partial brake on this concentration of power over germplasm resources by seed companies.

This Court's interpretation of the farmer's exemption is of central importance in the ongoing struggle over who will control the food supply of the nation and the world. Until recently, control over the food supply has been disbursed among a multitude of farmers; now, however, seed developers seek to subjugate the rights of farmers in favor of large corporate interests. Congress refused to enact a version of the PVPA which rigidly limited seed saving and banned farmer-to-farmer seed sales. This Court should uphold the intent of Congress and affirm the right of farmers embodied in the farmer's exemption to save, sell, and swap seed.

### CONCLUSION

Twenty-five years ago, a House subcommittee recommended passage of H.R. 13631, a plant protection act which had the enthusiastic backing of the seed industry. That bill contained a strict limitation on seed saving and did not allow farmer-to-farmer sales of protected varieties. These provisions were never enacted: they were never even brought up for a vote. The issues of statutory construction raised by the Petitioner can be resolved simply and without resort to statutory gymnastics. The PVPA has never contained a quantitative restriction on the right of farmers to save seed. Nor has it ever contained a quantitative limitation on the right of farmers to sell that seed to other farmers.

In both 1970, when the PVPA was enacted, and in 1980, when it was amended, the seed breeding industry

<sup>20</sup> It is a matter of general knowledge that seeds are more expensive in Europe where farmers are not allowed to save seed but must repurchase year after year.

had an opportunity to convince Congress of the wisdom of severe restrictions on the right to save seed and the right of farmers to sell saved seed to other farmers. It failed both times. On a matter fraught with such important consequences for agricultural development and the relationship between farmers and suppliers, the seed industry should not be permitted to win in the courtroom what it has failed to secure through the legislative process.

Respectfully submitted,

*Of Counsel*

JAMES A. KEMPE  
P.O. Box 385  
Barrington, IL 60011  
(708) 428-1002

DAVID CHARLES MASSELLI \*  
TRACY ANN ROMAN  
MASSELLI & LANE, P.C.  
8260 Greensboro Drive  
Suite 260  
McLean, Virginia 22102  
(703) 556-9550

*Counsel for Amicus Curiae*

\* Counsel of Record